In the

United States Court of Appeals for the Third Circuit

Case No. 23-2052

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Appellant,

v.

PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, ET AL.,

Appellees.

On Appeal from an Order Entered by the United States District Court for the Middle District of Pennsylvania (The Honorable Christopher C. Conner)

BRIEF AND ADDENDUM OF APPELLANT TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC AND JOINT APPENDIX VOL. 1 (APPX1-25)

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 23-2052

Transcontinental Gas Pipe Line Company, LLC

v.

Pennsylvania Environmental Hearing Board, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Transcontinental Gas Pipe Line Company, LLC makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: Williams Partners Operating LLC

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

The Williams Companies, Inc. owns 10% or more of the limited liability company interest of Williams Partners Operating LLC

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

The Williams Companies, Inc. In addition, publicly-traded Regional Energy Access Expansion customer companies or publicly-traded parent companies of such customers are identified in the chart below:

Parent Company	Shipper Company
Exelon Corporation	PECO Energy Company
Exelon Corporation	Baltimore Gas & Electric Company INC
New Jersey Resources Corporation	New Jersey Natural Gas Company
Public Service Enterprise Group Inc	PSEG Power LLC
South Jersey Industries	Elizabethtown Gas Company
South Jersey Industries	South Jersey Resources Group LLC
The Williams Companies, Inc.	Sequent Energy Management LLC

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable

s/ Elizabeth U. Witmer
(Signature of Counsel or Party)

Dated: August 30, 2023

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GLOSSARY

401 WQC	Water Quality Certification issued by PADEP under Section 401 of the CWA for Transco's Project
Certificate Order	Certificate of public convenience and necessity that FERC issued to Transco for the Project on January 11, 2023. *Transcon. Gas Pipeline Co., LLC*, 182 FERC ¶ 61,006 (2023)
CWA	Clean Water Act
EHB	Pennsylvania Environmental Hearing Board
EHB Appeal	The EHB Appellants' appeals of the REAE Permits at EHB Docket No. 2023-026-L
EHB Appellants	Citizen's for Pennsylvania's Future, Delaware Riverkeeper Network, and Maya K. van Rossum
ERAC	Ohio Environmental Review Appeals Commission
FERC	Federal Energy Regulatory Commission
NGA	Natural Gas Act
NJDEP	New Jersey Department of Environmental Protection
PADEP	Pennsylvania Department of Environmental Protection
Project	Transco's Regional Energy Access Expansion
REAE Permits	Erosion and Sediment Control Permit No. ESG830021002-00, Water Obstruction and Encroachment Permit No. E4083221-006, and Water Obstruction and Encroachment Permit No. E4583221-002 issued by PADEP for Transco's Project
Riverkeeper	EHB Appellant Delaware Riverkeeper Network

Transco	Appellant Transcontinental Gas Pipe Line Company, LLC

INTRODUCTION

Consistent with the Natural Gas Act's ("NGA's") grant of original and exclusive jurisdiction to this Court, its unequivocal language in Section 717r(d)(1), its broad preemption of state regulation, and its clear legislative history accompanying the 2005 Energy Policy Act amendments stating that Section 717r(d)(1) was added to the NGA to avoid the "series of sequential administrative … appeals that [could] kill a project with a death by a thousand cuts,"[1] the NGA prescribes a specific federal review process for any federally-delegated, state-issued orders under the Clean Water Act ("CWA"). If a state issues a final order, the review of the final order is subject to the "*original and exclusive jurisdiction*" of the federal Courts of Appeals. 15 U.S.C. § 717r(d)(1) (emphasis added). In Pennsylvania, the Pennsylvania Department of Environmental Protection ("PADEP") is the *only* state agency authorized to issue CWA permits and exercise the federally-delegated authority that the NGA preserves.

At issue here are certain final permits issued by PADEP under the CWA[2] for Transcontinental Gas Pipe Line Company, LLC's ("Transco's") Regional Energy

[1] *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (quoting statement of Mark Robinson, Director, Office of Energy Projects, Federal Energy Regulatory Commission ("FERC"), Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res., 109th Cong. 41 (2005)).

[2] Erosion and Sediment Control Permit No. ESG830021002-00, Water Obstruction and Encroachment Permit No. E4083221-006, and Water Obstruction and

Access Expansion (the "Project") which were appealed to the Environmental Hearing Board ("EHB"), a separate quasi-judicial state agency, rather than to this Court.[3] The EHB Appeal may only proceed if it is not cut off by the exclusive grant of jurisdiction to this Court, or if it is not preempted by the NGA. Transco seeks to enjoin the EHB Appellants' attempt to appeal to the EHB because review of the REAE Permits may only proceed in this Court, which has exclusive jurisdiction, and such review in the EHB is otherwise preempted by the NGA.

This Court should clarify NGA § 717r(d)(1)'s application in Pennsylvania by holding, in no uncertain terms, and consistent with its decisions in the *Riverkeeper* cases[4] summarized in Argument § II, below, and in *Township of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018), that appeals of final PADEP-issued permits for interstate natural gas projects must be heard in this Court, or not at all. That is the

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Encroachment Permit No. E4583221-002 issued by PADEP for Transco's Project (the "REAE Permits").

[3] The REAE Permits were appealed to the EHB (the "EHB Appeal") by Appellees the Delaware Riverkeeper Network, Maya K. van Rossum, and Citizen's for Pennsylvania's Future (collectively, the "EHB Appellants").

[4] *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 783 F. App'x 124 (3d Cir. 2019) ("*Riverkeeper V*"); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 751 F. App'x 169 (3d Cir. 2018) ("*Riverkeeper IV*"); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 903 F.3d 65 (3d Cir. 2018) ("*Riverkeeper III*"), *cert. denied*, 139 S. Ct. 1648 (2019); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 870 F.3d 171 (3d Cir. 2017) ("*Riverkeeper II*"); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360 (3d. Cir. 2016) ("*Riverkeeper I*").

only interpretation that harmonizes this Court's precedents with the NGA's grant of original and exclusive jurisdiction to this Court, the NGA's broad preemption of state regulation, the plain language of NGA § 717r(d)(1), and the legislative history accompanying the 2005 Energy Policy Act amendments that added § 717r(d) to the NGA.

With the District Court's error of law corrected, Transco easily satisfies the requirements for a preliminary injunction. Transco will suffer irreparable injury without an injunction by being forced to participate in a preempted proceeding because "the hardship is the process itself." *NE Hub Partners, L.P. v. CNG Transmission Corp*., 239 F.3d 333, 343 (3d Cir. 2001). By contrast, an injunction would not harm the EHB Appellants, who still have the option of filing a proper appeal of the REAE Permits in this Court. A stay is the natural consequence of enforcing federal law, which the EHB Appellants chose to disregard by appealing the REAE Permits to the EHB rather than to this Court. A stay also vindicates the public interest by protecting Congress's express intent to streamline the review of state-issued permits for natural gas pipelines by funneling all permit appeals to this Court. A stay also promotes the public interest by avoiding EHB interference with a project that FERC has determined serves the national public interest.

For these reasons, and those set forth below, Transco respectfully requests that this Court reverse the District Court's order and remand with instructions to enter a

preliminary injunction enjoining: (1) the EHB from considering the EHB Appeal; and (2) EHB Appellants from seeking any other relief from the EHB with respect to the REAE Permits.

STATUTES, RULES, AND REGULATIONS

Applicable statutes, rules, and regulations are contained in this Brief's Addendum.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this action under 28 U.S.C. § 1331 because the causes of action asserted in Transco's complaint arise under the Constitution and laws of the United States, including, but not limited to, the Supremacy Clause, U.S. Const. Art VI, cl. 2, the Commerce Clause, U.S. Const. Art I, Section 8, cl. 3, the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See also* Memorandum, R. 29, at 6 n.7, Appx11 ("Transco appropriately invokes our federal question jurisdiction under 28 U.S.C. § 1331, and asks us to declare its rights under federal law (*viz.*, the NGA) pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.").

This Court has jurisdiction to review the District Court's denial of Transco's emergency motion for preliminary injunction under 28 U.S.C. § 1292(a)(1) because the District Court's order is an "[i]nterlocutory order[] of [a] district court[] of the United States . . . refusing . . . [an] injunction[]." Transco's appeal is timely because

it was filed on June 7, 2023, two days after the District Court entered the order under review on June 5, 2023. *See* Fed. R. App. P. 4(a)(1)(A) (notice of appeal must be filed within 30 days after entry of the order appealed from).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in denying Transco's motion for preliminary injunction by finding that Transco had not established a sufficient likelihood of success on the merits of its claims when the NGA grants this Court "original and exclusive jurisdiction" to review PADEP's permits and the NGA preempts the EHB's review pursuant to state law?

Raised: Memo. of Law in Support of Transco's Emergency Motion for Preliminary Injunction, R 10, at 1-4, 9-24, Appx269-272, Appx277-292; Reply Brief in Support of Transco's Emergency Motion for Preliminary Injunction, R. 25, at 1-19, Appx377-395.

Objected to: Not applicable.

Ruled upon: Order, R. 30, at 1, Appx5; Memorandum, R. 29, at 6-16, Appx11-21.

2. Whether the District Court erred in denying Transco's motion for preliminary injunction by finding that Transco had not established that it would suffer irreparable harm without preliminary injunctive relief?

Raised: Memo. of Law in Support of Transco's Emergency Motion for Preliminary Injunction, R. 10, at 1-4, 24-28, Appx269-272, Appx292-296; Reply Brief in Support of Transco's Emergency Motion for Preliminary Injunction, R. 25, at 11-12, 15, 20-21, Appx387-388, Appx391, Appx396-397.

Objected to: Not applicable.

Ruled upon: Order, R. 30, at 1, Appx5; Memorandum, R. 29, at 16-19, Appx21-24.

3. Whether the District Court erred in declining to consider the last two factors for evaluating a motion for preliminary injunctive relief – the balance of harms and the public interest – both of which weigh in favor of granting Transco's requested relief?

Raised: Memo. of Law in Support of Transco's Emergency Motion for Preliminary Injunction, R. 10, at 1-4, 28-31, Appx269-272, Appx296-299; Reply Brief in Support of Transco's Emergency Motion for Preliminary Injunction, R. 25, at 15, Appx391.

Objected to: Not applicable.

Ruled upon: Order, R. 30, at 1, Appx5; Memorandum, R. 29, at 19, Appx24.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This proceeding has not been before this Court previously. Pursuant to Third Circuit Local Appellate Rule 28.1(a)(2), related proceedings are noted below.

1. The quasi-judicial administrative proceeding before the Pennsylvania Environmental Hearing Board that the federal lawsuit below seeks to enjoin is: *Citizens for Pennsylvania's Future, et al. v. PADEP*, EHB Docket No. 2023-026-L.

2. Appeals of various orders issued by FERC in connection with the same interstate natural gas pipeline project involved here are pending in the U.S. Court of Appeals for the D.C. Circuit in consolidated actions that contain the following individual docket numbers, where merits briefing is underway:

a. *New Jersey Conservation Foundation, et al. v. FERC*, No. 23-1064 (D.C. Cir.);

b. *New Jersey Conservation Foundation, et al. v. FERC*, No. 23-1074 (D.C. Cir.);

c. *Delaware Riverkeeper Network, et al. v. FERC*, No. 23-1077 (D.C. Cir.);

d. *Sierra Club and Food & Water Watch v. FERC*, No. 23-1129 (D.C. Cir.);

e. *Delaware Riverkeeper Network, et al. v. FERC*, No. 23-1130 (D.C. Cir.); and

f. *New Jersey Conservation Foundation, et al. v. FERC*, No. 23-1137 (D.C. Cir.).

Transco also notes that the Supreme Court of Pennsylvania granted petitions for allowance of appeal in the following cases involving NGA Section 19(d), which are currently in the briefing phase with opening briefs due on September 18, 2023:

a. *Cole v. PADEP*, No. 415 MAL 2021 (Pa. S. Ct.);

b. *Cole v. PADEP*, No. 312 EAL 2021 (Pa. S. Ct.);

c. *West Rockhill Township v. PADEP*, No. 416 MAL 2021 (Pa. S. Ct.); and

d. *West Rockhill Township v. PADEP*, No. 313 EAL 2021 (Pa. S. Ct.).

STATEMENT OF THE CASE

I. Background

A. FERC Approves the Regional Energy Access Expansion Project

FERC approved this interstate natural gas pipeline Project because it found that Transco demonstrated a need for the Project, that the Project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, and that the Project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. *See Transcon. Gas Pipeline Co., LLC*, 182 FERC ¶ 61,006 (2023) (the "Certificate Order"), ¶ 6, Appx209-210. The Project will provide 829,400 dekatherms per day of incremental firm transportation service (enough natural gas supply to serve approximately 3 million

homes)[5] to committed shippers in New Jersey and Maryland. *See* Certificate Order, ¶ 1, Appx208.

FERC is the "lead agency for the purposes of coordinating all applicable Federal authorizations." 15 U.S.C. § 717n(b)(1). After a rigorous multi-year review process, FERC issued to Transco on January 11, 2023, an Order Issuing Certificate and Approving Abandonment, which issued a certificate of public convenience and necessity to Transco for the Project. *See* Certificate Order. Issuance of the Certificate Order was conditioned upon Transco obtaining federal authorizations. *See* 15 U.S.C. § 717n(b)(1); Certificate Order, Ordering Paragraph (C)(3), Environmental Conditions 10, 13, Appx235, Appx242, Appx243. One of the required federal authorizations for the Project is a Water Quality Certification under Section 401 of the Clean Water Act ("401 WQC"), 33 U.S.C. § 1341, which in turn contained conditions requiring Transco to obtain the REAE Permits. *See* 401 WQC, Conditions 2 and 3, Appx204. Transco therefore obtained the REAE Permits for the Project as part of its federal authorizations. *See Riverkeeper II*, 870 F.3d at 175-76.

The FERC Certificate Order authorizes Transco to construct and operate the Project, subject to conditions contained therein which includes the obligation to obtain all required federal permits. *See* Certificate Order, Ordering Paragraph (A),

[5] Regional Energy Access Brochure, p. 1, available at: https://www.williams.com/expansion-project/regional-energy-access/.

Appx235. On March 23, 2023, FERC agreed that Transco had obtained all required federal permits, including the REAE Permits, and issued a Notice to Proceed authorizing Transco to commence construction of all components of the Project.[6]

While the appeal of that construction authorization is pending in the consolidated appeals at *New Jersey Conservation Foundation, et al. v. FERC*, No. 23-1064 (D.C. Cir.), construction of the Project is ongoing.[7]

B. The REAE Permits and EHB Appeal

PADEP issued the required 401 WQC to Transco on March 30, 2022, and it contained conditions requiring Transco to obtain the REAE Permits. *See* Certificate Order, Ordering Paragraph (C)(3), Environmental Conditions 10, 13, Appx235, Appx242, Appx243; 401 WQC, Conditions 2 and 3, Appx204.[8] The REAE Permits

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[6] The March 23, 2023, Notice to Proceed is a matter of public record that is subject to judicial notice under Fed. R. Evid. 201. It is available at: https://elibrary.ferc.gov/eLibrary/filedownload?fileid=617DCCED-94A1-C1C5-8B27-870FF2300000.

[7] *See, e.g.*, August 4, 2023 and August 18, 2023 Biweekly Construction Status Reports, FERC Docket CP21-94-000, which are available here: https://elibrary.ferc.gov/eLibrary/filedownload?fileid=6556F071-0FCC-CB7B-9E34-89C101900000 and https://elibrary.ferc.gov/eLibrary/filedownload?fileid=E61E7536-CDDA-CD0A-9CCD-8A092B600000.

[8] The 401 WQC is a matter of public record that is subject to judicial notice under Fed. R. Evid. 201. The 401 WQC is available as part of the record before FERC at https://elibrary.ferc.gov/eLibrary/filedownload?fileid=E58779DE-E7D4-C985-9E2C-7FE6A6F00000 and https://elibrary.ferc.gov/eLibrary/filedownload?fileid=5C9947CD-EC55-C79B-8407-7FE6A7000000 (Transco's April 1, 2022 Supplemental Information Filing).

are part of the federal authorizations. *See Riverkeeper II*, 870 F.3d at 175-76. PADEP issued the REAE Permits on February 3, 2023.[9] On March 14, 2023, the EHB Appellants appealed the REAE Permits to the EHB, but not to this Court.[10] While EHB appeals must be filed within 30 days under state law, EHB Appellants have up to four years to seek review of the REAE Permits in this Court. *See Riverkeeper II*, 870 F.3d at 178-79.

II. Procedural History and Ruling Presented for Review

On March 16, 2023, Transco filed this action in the District Court seeking to enjoin the EHB Appeal and a declaration that this Court has original and exclusive jurisdiction to review the REAE Permits. The same day, the EHB issued Pre-Hearing Order No. 1 in the EHB Appeal, which sets deadlines for discovery, settlement discussions and reporting, and dispositive motions, and would otherwise require Transco to participate in the EHB Appeal.[11]

[9] The REAE Permits are a matter of public record subject to judicial notice under Fed. R. Evid. 201. The REAE Permits are available as part of the record before FERC at https://elibrary.ferc.gov/eLibrary/filedownload?fileid=77CB6A16-6995-C9AB-93AF-865591B00000 (Attachment 3 to Transco's February 14, 2023 Request for Notice to Proceed for Tree Felling Activities).

[10] The EHB Appeal is a matter of public record that is subject to judicial notice under Fed. R. Evid. 201.

[11] EHB's Pre-Hearing Order No. 1 is a matter of public record that is subject to judicial notice under Fed. R. Evid. 201.

On March 24, 2023, Transco moved for emergency preliminary injunctive relief to enjoin the EHB Appeal. The District Court denied Transco's motion on June 5, 2023, and Transco immediately appealed that decision to this Court under 28 U.S.C. § 1292(a)(1).

On June 23, 2023, Transco moved this Court for a stay of the EHB Appeal or, in the alternative, to expedite this appeal. The EHB Appellants opposed Transco's motion and filed a cross-motion to hold this appeal in abeyance pending the District Court's ruling on their motion to dismiss Transco's complaint. On August 9, 2023, the Court denied Transco's motion for a stay and the EHB Appellants' cross-motion, but granted Transco's motion to expedite the appeal. *See* Doc. 24. On August 11, 2023, Transco filed a motion to stay the EHB proceedings before the EHB and PADEP consented to that motion. On August 14, 2023, the EHB Appellants served deposition notices and written discovery on Transco as part of the EHB Appeal. On August 29, 2023, the EHB denied the requested stay, with no opinion. *See* EHB Docket No. 2023-026-L (Order Aug. 29, 2023).[12]

[12] Available at: https://ehb.courtapps.com/efile/documentViewer.php?documentID=61182.

SUMMARY OF THE ARGUMENT

This Court should reverse and remand for at least the following reasons:

First, the District Court committed a dispositive error of law in ruling that the NGA allows the EHB to exercise concurrent jurisdiction over the review of PADEP-issued permits for an NGA-governed pipeline project when the NGA grants exclusive jurisdiction for review of the permits to this Court.

The NGA precludes any role for the EHB in connection with the issuance and review of the REAE Permits as an action of a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval … required under Federal law …." because the NGA preserves for states only their federally-delegated authority under the CWA and two other federal statutes. 15 U.S.C. § 717r(d)(1). The EHB, a state agency independent of PADEP which conducts evidentiary trials and makes rulings on a new record made before it after discovery and a trial, has no such authority under the CWA or any other federal statute; its authority derives entirely from state law. Moreover, any appeal to the EHB would be conflict preempted because review in the EHB would mean that the REAE Permits would escape review in the only Court which has the original and exclusive jurisdiction to review such permits – this Court.

The District Court relied heavily on this Court's *Bordentown* decision in denying Transco relief, but the District Court erred in relying on *Bordentown* since

there is a fundamental difference between Pennsylvania and New Jersey administrative processes as to when the agency authorized to issue a Water Quality Certification has reached the end of its intra-agency determinations and has taken a final action. *Bordentown*'s holding was simply that "the petitioners were entitled under New Jersey law to have alternatively first sought an ***intra-agency*** adjudicative hearing." *Bordentown*, 903 F.3d at 271 (emphasis added). Unlike the facts in *Bordentown*, the EHB's review of the REAE permits is not an "intra-agency" proceeding; it is an appeal to a separate, independent state agency which acts in a judicial capacity. The EHB is not part of the PADEP, which issued a final permit under the CWA. The PADEP action in issuing the REAE Permits is final and ripe for review in this Court, which is the only venue for review of that decision. *Riverkeeper III*, 903 F.3d at 73-75.

Second, the District Court compounded its error on the merits by finding that Transco had not demonstrated irreparable harm from being forced to participate in a preempted proceeding, the result of which could never be reviewed in this Court – the only court that Congress intended to review final PADEP permits for NGA projects. Transco also has incurred (and will continue to incur) unrecoverable financial costs, which constitutes further irreparable harm. Finally, any delay in placing the Project in-service that may result from the EHB proceedings places Transco at significant risk of suffering further irreparable injury.

Third, the balance of harms and public interest favor awarding Transco injunctive relief. The District Court did not reach these factors; however, enjoining the EHB Appeal will not harm the EHB Appellants because that is simply the consequence of enforcing federal law, and they may still pursue an appeal to this Court as the NGA expressly provides.[13] An injunction also vindicates the public interest by honoring Congress's decision to assign "original and exclusive" jurisdiction for the review of final PADEP permits to this Court and by avoiding the risk of EHB interference with a Project that FERC determined serves the national public interest.

ARGUMENT

I. Standard of Review

The standard for review is *de novo* because the District Court's ruling on Transco's motion for a preliminary injunction turned solely on issues of law and not on findings of fact. "In reviewing the grant or denial of a preliminary injunction, [the Third Circuit] employ[s] a tripartite standard of review: findings of fact are reviewed for clear error, legal conclusions are reviewed *de novo*, and the decision to grant or deny an injunction is reviewed for abuse of discretion." *Osorio-Martinez v. Att'y Gen. U.S.*, 893 F.3d 153, 161 (3d Cir. 2018) (citation omitted). The relevant standard for reviewing the District Court's legal analysis and application of the NGA is *de*

[13] *See Riverkeeper II*, 870 F.3d at 179.

novo. *See Kiareldeen v. Ashcroft*, 273 F.3d 542, 545 (3d Cir. 2001) (district court's interpretation of statute reviewed *de novo*); *In re Visual Indus., Inc.*, 57 F.3d 321, 324 (3d Cir. 1995) (exercising "plenary review" over district court's interpretation and application of statute). Accordingly, although the District Court's "ultimate determination" of whether to grant an injunction is generally reviewed for an abuse of discretion, the plenary standard of review over the underlying legal principles controls the overarching analysis here because "a district court by definition abuses its discretion when it makes an error of law." *In re SemCrude L.P.*, 796 F.3d 310, 316 (3d Cir. 2015) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

II. This Court's Previous Decisions Addressing the EHB and the NGA

The issues in this case stem from a series of decisions from this Court interpreting § 717r(d)(1) of the NGA. Of particular relevance are the opinions involving federally-delegated permits issued by PADEP under the CWA. One of the EHB Appellants, the Delaware Riverkeeper Network ("Riverkeeper"), was involved in every case. It is important to understand the holdings of these cases because they underlie Transco's position here:

- PADEP's action in issuing a permit pursuant to the CWA "is subject to review exclusively in the Courts of Appeals." *Riverkeeper I*, 833 F.3d at 372.

- PADEP's action in issuing a permit pursuant to the CWA is final without review by the EHB. *Riverkeeper II*, 870 F.3d at 175-78.
- PADEP and the EHB are "entirely independent agencies. Each conducts a separate proceeding, under separate rules, overseen by separately appointed officers." *Riverkeeper III*, 903 F.3d at 73.
- Even when an appeal to the EHB is filed, "Pennsylvania cannot declare when and how an agency action taken pursuant to federal law is sufficiently final to be reviewed in federal court." *Riverkeeper III*, 903 F.3d at 74.

The first Riverkeeper case, *Riverkeeper I*, involved Riverkeeper's challenge to PADEP's CWA permit for an interstate natural gas pipeline and the jurisdiction of this Court to review the permit. As to jurisdiction, the Court found:

> … ***a state action taken pursuant to the Clean Water Act or Clean Air Act is subject to review exclusively in the Courts of Appeals.*** To bar this Court's review of PADEP's actions in permitting an interstate natural gas facility pursuant to the Natural Gas Act and the Clean Water Act would frustrate the purpose of Congress's grant of jurisdiction and render superfluous the explicit exception from federal judicial review of the Coastal Zone Management Act.

Riverkeeper I, 833 F.3d at 372 (emphasis added).

In another case, *Riverkeeper II*, Riverkeeper challenged the finality of PADEP's permits before an appeal was brought to the EHB. The Court held that PADEP permits, once issued, are final:

> Riverkeeper argues that we lack jurisdiction because we may only review final orders, and PADEP's order is not final until it has been reviewed by a separate administrative entity, Pennsylvania's Environmental Hearing Board. Riverkeeper asks us to transfer the case to the Board. ***We conclude that jurisdiction is proper because PADEP's order is final***.

Riverkeeper II, 870 F.3d at 175 (emphasis added).

In that case, Riverkeeper had not appealed to the EHB, so the Court noted that it did not need to consider whether the appeal affected the finality of the PADEP permit, but the Court ultimately reasoned:

> Apart from § 7514(c), PADEP's permits also bear the traditional hallmarks of final agency action. ***There is nothing left for the agency to do***, and thus PADEP's decision "mark[s] the 'consummation' of the agency's decisionmaking process" and is not "of a merely tentative or interlocutory nature." Furthermore, its order is "one by which 'rights or obligations have been determined,' [and] from which 'legal consequences will flow.'" … ***Thus, by combination of § 7514(c) and the practical significance of PADEP's permits, we conclude that we are reviewing final agency action***.

Riverkeeper II, 870 F.3d at 178 (emphasis added) (internal citations omitted).

Finality was an issue again in the third Riverkeeper case, *Riverkeeper III*: "We turn next to whether the Department's decision is a conclusive agency action, such

that a 'civil action for [its] review' is committed to our exclusive jurisdiction under the Natural Gas Act." 903 F.3d at 71. In that case, the Court considered the function and authority of the EHB in detail:

> ***The EHB is wholly separate from PADEP. The Board is an "independent quasi-judicial agency,"*** 35 PA. STAT. ANN. § 7513(a), and its members—full-time administrative law judges—are appointed by the Governor of Pennsylvania without any involvement by either PADEP or the state's Secretary of Environmental Protection, *id.* § 7513(b). Final orders of the EHB may be appealed to the Commonwealth Court. 42 PA. CONS. STAT. § 763(a)(1). Two features of the Board's review deserve special mention. ***First, an appeal to the EHB does not prevent PADEP's decision from taking immediate legal effect.*** The statute creating the Board expressly provides that "[n]o appeal shall act as an automatic supersedeas," 35 PA. STAT. ANN. § 7514(d)(1), and the EHB itself regards it as "axiomatic that the mere pendency of litigation before the Board ... has no effect on the validity or viability of the Department action being appealed .... An appeal to the Board does not operate as a stay," *M&M Stone Co. v. Commw. of Pa., Dept. of Envtl. Prot.*, EHB Docket No. 2007-098-L, 2009 WL3159149, at *3 (Pa. Envtl. Hrg. Bd. Sept. 7, 2009) (citations omitted). ***Second, the EHB's review of PADEP decisions is conducted largely de novo, with parties entitled to introduce new evidence and otherwise alter the case they made to the Department.*** While Pennsylvania law refers to proceedings before the EHB as an "appeal," the Commonwealth Court has explained that the Board is not an "appellate" tribunal in the ordinary sense of that term. The Board does not have "a limited scope of review attempting to determine if [PADEP]'s action can be supported by the evidence received ... [by PADEP]. Rather, the [Board's] duty is to determine if [PADEP]'s action can be sustained or supported by the evidence taken by the [Board]." *Leatherwood, Inc. v. Commw., Dept. of*

> *Envtl. Prot.*, 819 A.2d 604, 611 (Pa. Commw. Ct. 2003) (emphasis added) (citation omitted).

Riverkeeper III, 903 F.3d at 72-73(bold emphasis added).

The Court also noted that:

> Pennsylvania law does not 'make[ ] clear that [Transco]'s application seeking a ... water quality certification initiated a single, unitary proceeding' taking place within one agency and yielding one final decision. . . . Quite the opposite. ***The Department and the Board are entirely independent agencies. Each conducts a separate proceeding, under separate rules, overseen by separately appointed officers.*** *Compare* 25 PA. CODE. Part I (Department of Environmental Protection), *with* 25 PA. CODE. Part IX (Environmental Hearing Board). Both in formal terms, *see* PERMITTING MANUAL, *supra*, § 400 at 6 (noting that publication in the Pennsylvania Bulletin marks a "final action of the Department"), and in the immediate practical effect discussed above, PADEP's issuance of a Water Quality Certification is that agency's final action, leaving nothing for the Department to do other than await the conclusion of any proceedings before the Board.

Id. at 73 (emphasis added).

III. The District Court Erred in Denying Transco's Motion for Preliminary Injunction Because PADEP's Issuance of the REAE Permits Can Only Be Reviewed by This Court Consistent with This Court's Prior Precedents and the NGA's Express Language

The NGA provides the United States Courts of Appeals with:

> ***[O]riginal and exclusive jurisdiction*** over any civil action ***for the review of an order or action of a*** Federal agency (other than the Commission) or ***State administrative agency acting pursuant to Federal law to issue***,

> condition, or deny ***any permit***, license, concurrence, or approval … ***required under Federal law*** ….

15 U.S.C. § 717r(d)(1) (emphasis added). This Court has already held that federal permits under the CWA such as the REAE Permits are "***subject to review exclusively in the Courts of Appeals***." *Riverkeeper I*, 833 F.3d at 372 (emphasis added). However, the District Court below denied Transco's request for a preliminary injunction to enjoin the EHB Appellants from pursuing review of the REAE Permits before the EHB on grounds that EHB review was available "if desired," relying primarily on *Bordentown*. Memorandum, R. 29, at 11, Appx16. The District Court erred in its assessment of Transco's likelihood of success on the merits, and this error resulted in the District Court's decision to deny Transco preliminary injunctive relief. The EHB Appeal must be enjoined, and this Court should reverse.

The EHB Appellants' arguments for concurrent jurisdiction with the state, as reflected in the District Court's decision, contravene the NGA's exclusive-jurisdiction provision and frustrate Congress's purpose of ensuring that challenges to an agency's final permit decision are adjudicated in federal court. *See Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) ("We should not lightly conclude that Congress enacted a self-defeating statute."). This is one of the instances when Congress specifically ousted state courts from concurrent jurisdiction with the federal courts. As this Court noted in a case under the Federal Power Act, which cites to *Tafflin v. Levitt*, 493 U.S. 455 (1990):

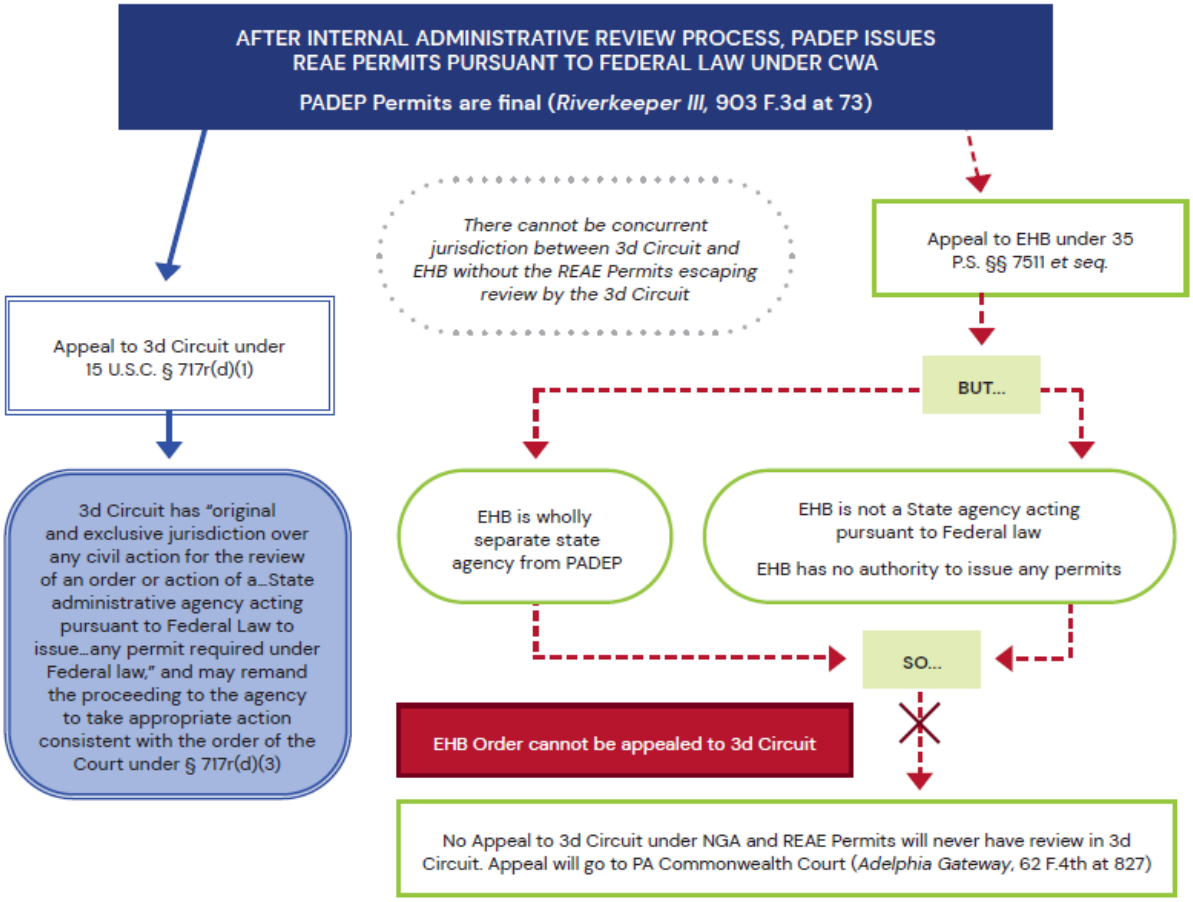
> The concurrent jurisdiction of the States is 'subject only to limitations imposed by the Supremacy Clause.' *Tafflin*, 493 U.S. at 458, 110 S.Ct. 792; *see also Del. River Port Auth.*, 290 F.3d at 576 (noting that it is well-settled that '[s]tate courts may answer federal questions'). Indeed, '[s]o strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second, '[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.'"

Metro. Edison Co. v. Pa. Pub. Util. Comm'n, 767 F.3d 335, 359 (3d Cir. 2014). The NGA grants exclusive jurisdiction only to this Court – not to the state courts. This Court has found the EHB to be a state court under certain circumstances.[14] Given this Court's acknowledgment that review of an EHB decision may only go to the state courts, *Riverkeeper III*, 903 F.3d at 72, if the EHB Appeal is allowed to proceed, there is no path by which this Court may exert its original and exclusive jurisdiction to review the REAE Permits. The explicit path in the NGA for review

[14] This Court noted that the EHB "has been held to be a 'State Court' for purposes of" certain federal laws, including the Federal Removal Statute. *Baughman v. Bradford Coal Co., Inc.*, 592 F.2d 215, 217-18 (3d Cir. 1979). Not only does an appeal to the EHB share the attributes of a "civil action" filed with a court, but the EHB itself has stated that "[w]e function as a trial court." *Ametek, Inc. v. Commw. of Pa., Dep't of Envtl. Prot.*, 2014 WL 1045641, at *3 (Pa. Env. Hrg. Bd. Feb. 24, 2014); *see also* Commonwealth of Pennsylvania Environmental Hearing Board, *History of the Environmental Hearing Board* ("Although the Board is not part of the judicial branch of government, it operates like a court."), available at: https://ehb.courtapps.com/content/ehb_history.php.

of permits issued by State agencies acting pursuant to Federal law will be frustrated, as depicted in Figure 1 below:

Figure 1



IV. The District Court Erred in Failing to Give Effect to the NGA's Provisions in Its Application of *Bordentown* to the EHB Appeal

The District Court failed to give effect to the exclusive grant of jurisdiction to this Court in § 717r(d)(1), primarily by relying on dicta in *Bordentown*, a case which was analyzing an entirely different state administrative process and which does not overrule the almost ten years of jurisprudence reflected in the *Riverkeeper* cases.

A. The *Bordentown* Holding Is Limited and Does Not Control Here

The District Court held that this Court's decision in *Bordentown* "strongly suggests" that an appeal to the EHB is available if desired, and the District Court relied primarily upon *Bordentown* in denying Transco's motion. *See* Memorandum, R. 29, at 9, 11, 13, 14 n.9, Appx14, Appx16, Appx18, Appx19. But *Bordentown's* holding is very narrow and limited to an agency's review of the agency's own decision: "Our holding is ***only*** that … the petitioners were entitled under New Jersey law to have alternatively first sought an ***intra-agency*** adjudicative hearing." *Bordentown*, 903 F.3d at 271 (emphasis added). This holding does not apply here because the EHB's review of the REAE permits is not an "intra-agency" proceeding, as this Court already found in *Riverkeeper III*, 903 F.3d at 72.

B. The EHB Appeal Is Not an "Internal Administrative Process" of PADEP

The District Court found that the intra-agency nature of *Bordentown* is not dispositive, echoing the EHB Appellants' argument that "[t]he EHB Appeal, as a part of Pennsylvania's internal administrative review process, is not preempted." Opp. to Mot. to Stay, Doc. 21, at 10. But this finding directly conflicts with the holding in *Riverkeeper III.* The District Court relies on the Environmental Hearing Board Act to claim an appeal to the EHB is "the next step in the administrative review of the PADEP permits." Memorandum, R. 29, at 12, Appx17. The District Court ignores this Court's analysis in *Riverkeeper III*, which rightly confirmed that

PADEP permits, once issued, are final. *See Riverkeeper III*, 903 F.3d at 73. Further, the Pennsylvania Legislature itself explicitly exempts PADEP from holding an intra-agency hearing before making a permit decision. *See* 35 P.S. § 7514(c) (providing that PADEP may take an action "without regard to 2 Pa.C.S. Ch. 5 Subch...A" and exempting 2 Pa.C.S. § 504 (hearing requirement)); *see also Kise v. Dep't of Military*, 832 A.2d 987, 995-96 (Pa. 2003) (finding Pennsylvania's Administrative Agency Law preempted because it is inconsistent with federal law).

Just as the Court in *Riverkeeper III* distinguished the Massachusetts permit review process from the Pennsylvania process, so must this Court distinguish the New Jersey permit review process in *Bordentown* from the Pennsylvania process. *Bordentown* dealt with a New Jersey administrative hearing that was part of the permitting agency's own decision-making process, a "unitary proceeding" which both Massachusetts and New Jersey have, but which Pennsylvania does not. *Bordentown*, 903 F.3d at 268 (Section 717r(d)(1) "does not implicate or preempt state agency review of the ***agency's own decision***") (emphasis added), *Riverkeeper III*, 903 F.3d at 73 ("*Berkshire Environmental* addressed a provisional order that could become final in the absence of an appeal, while we are presented with a final order that could be overturned in the event of an appeal. In that regard, PADEP's order is no less final for the availability of EHB review than a federal agency's is for the availability of review in this Court.").

Bordentown did not use the term "intra-agency" inadvertently. The *Bordentown* court noted that Congress:

> [C]learly understood the difference between establishing direct judicial 'review' over agency action (supplanting any alternative ***intra-agency process***) and creating an exclusive judicial forum in the federal Courts of Appeals for a 'civil action' challenging ***an agency's decision making (separate from the agency's own internal review process***).

Id. (emphasis added). *Bordentown* notes that there is "no indication that Congress … intended to dictate how (as opposed to how quickly) [the state agency] conducts its ***internal*** decision-making before ***finally acting***." *Id.* (citing *Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co.*, 851 F.3d 105, 112-13 (1st Cir. 2017) (emphasis added)). And relevant here, *Bordentown* noted that "'state procedures giving rise to orders reviewable under § 717r(d)(1) may (and undoubtedly do) vary widely from jurisdiction to jurisdiction,' some of which may permit intra-agency review and others which may not." *Id. Bordentown* explains the rationale for its holding: "NJDEP [the New Jersey Department of Environmental Protection ("NJDEP")] must clearly articulate the reasoning behind ***its*** decision so that a reviewing court can determine whether the decision was in error." *Id.* at 270 (emphasis added). In addressing why the NGA did not disturb NJDEP's own review, *Bordentown* made clear that "***the agency charged with administering the permitting process***" is not "divested of ***its*** authority to review challenges to ***its permits*** via ***its***

established administrative procedures." *Id.* at 271, n.24 (emphasis added). All told, *Bordentown* referred to internal, intra-agency review nine times.[15]

The District Court's ruling relying on *Bordentown* adopts a reading of the NGA that this Court refused to adopt when it was explicitly asked to do so. This Court would not have rendered the decision in *Riverkeeper III* (just one day before the *Bordentown* decision) if the EHB appeal pending in that case was a necessary precursor to judicial review, given that the petitioners "desired" the EHB appeal. *Compare* Memorandum, R. 29, at 11, Appx16 (state administrative review is "available if desired").[16] The petitioners in *Riverkeeper III* actually sought rehearing on grounds that it conflicted with *Bordentown*. In their petition for rehearing, the petitioners raised the same points now relied upon by the District Court claiming

[15] *Bordentown* referred to "intra-agency" review four times, in addition to the five times it referred to an agency's "internal" review.

[16] The EHB Appellants argue that this Court's statement in *Riverkeeper III* that it had original and exclusive jurisdiction to review PADEP's permits "[n]otwithstanding the availability of an appeal to the EHB," 903 F.3d at 74, means an EHB appeal remains available, misconstruing the word notwithstanding. This Court has jurisdiction to review PADEP permits "without prevention or obstruction from or by" an EHB appeal that may ordinarily be available under Pennsylvania law. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 128 (2012) (discussing use of "notwithstanding"); *see also Appalachian Voices v. U.S. Dep't of the Interior*, No. 23-1384, 2023 WL 5163878, at *3 (4th Cir. Aug. 11, 2023) (citing *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1169 (9th Cir. 2007) ("[W]hen Congress has directed immediate implementation 'notwithstanding any other provision of law,' we have construed the legislation to exempt the affected project from the reach of environmental statutes which would delay implementation.")).

that EHB review was not a "civil action" and asserting that the NGA should not preempt the EHB appeal process. *See* Delaware Riverkeeper Network's Petition for Rehearing, Third Circuit Docket No. 16-2211 (Sept. 18, 2018). This Court denied the petition for rehearing, and the United States Supreme Court denied the Delaware Riverkeeper Network's petition for certiorari. *See* 139 S. Ct. 1648 (2019).

C. The EHB Is a Separate State Agency and Does Not Act Pursuant to Federal Law

The District Court based its decision on its mistaken view that an EHB appeal is effectively the same as the NJDEP's intra-agency adjudicatory process at issue in *Bordentown*, when that is not the case. *See* Memorandum, R. 29, at 13, Appx18. An EHB appeal is not an intra-agency administrative action within PADEP, but is an appeal to a separate administrative agency. *Riverkeeper II*, 870 F.3d at 175.

The EHB "is an 'independent quasi-judicial agency'" that "is wholly separate from PADEP." *Riverkeeper III*, 903 F.3d at 72. PADEP and the EHB "are entirely independent agencies." *Id.* at 73. The EHB's authority is derived solely from Pennsylvania law. *See* 35 P.S. §§ 7511 *et seq.*; *Riverkeeper III*, 903 F.3d at 72; *Tenn. Gas Pipeline Co. LLC v. Del. Riverkeeper Network*, 921 F. Supp. 2d 381, 390 (M.D. Pa. 2013) ("[T]he EHB's authority and jurisdiction exist pursuant to state law only."). Unlike NJDEP, which was the state agency at issue in *Bordentown*, the EHB does not act "pursuant to Federal law," and does not "issue, condition, or deny" any permits "required under Federal law." 15 U.S.C. § 717r(d)(1). Just like a trial court,

the EHB renders a decision based on a separate record based on evidence presented to the EHB, which may include new evidence not previously submitted to PADEP. *Riverkeeper III*, 903 F.3d at 72-73; *compare Riverkeeper I*, 833 F.3d at 381 ("The administrative record is supposed to reflect the information available to the decision maker at the time the challenged decisions were made ….").

PADEP is the sole agency in Pennsylvania which certifies compliance with CWA Section 401. *See Riverkeeper III*, 903 F.3d at 72; *Riverkeeper I*, 833 F.3d at 385; *Solebury Twp. v. Dep't of Envtl. Prot.*, 928 A.2d 990, 998-99 (Pa. 2007); *Tire Jockey*, 915 A.2d at 1187; 25 Pa. Code § 105.15(b). The EHB does not play any role under the CWA, nor is the EHB a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law . . . ." 15 U.S.C. § 717r(d)(1) (emphasis added); *see also City of Harrisburg v. Commonwealth*, No. 88-120-R, 1996 WL 375864, at *1 (Pa. EHB June 28, 1996) (following eight years of litigation, the EHB issued an order directing PADEP to issue a permit because the EHB is not itself a permitting agency). The EHB does not even have authority to hear challenges to the water quality standards established in Pennsylvania. *See U.S. Steel Corp. v. Commonwealth*, 442 A.2d 7, 9 (Pa. Commw. Ct. 1982).

Bordentown simply does not apply to Pennsylvania's administrative scheme where the EHB is structurally separate from PADEP, which is the agency that

actually issues permits. *Del. Riverkeeper III*, 903 F.3d 65, 71; *Del. Riverkeeper V*, 783 F. App'x 124, 127 (3d Cir. 2019) ("[A] final decision by the [the Department] is a final agency action and is ripe for review."). This is clear from PADEP's own filings in this case. *See* PADEP's Response to Mot. to Stay, Doc. 20, at 2 ("PADEP has the duty and authority to issue, administer and enforce, *inter alia*, certifications of compliance with Pennsylvania Water Quality Standards pursuant to Section 401 of the Federal Water Pollution Control Act ….").

Further, to the extent that a state agency's order under the CWA is enforceable, it must be one that is made reviewable under the NGA; otherwise, Congress's entire purpose in enacting § 717r(d)(1) would be lost. *Bordentown*, 903 F.3d at 268 (citing *Berkshire*, 851 F.3d at 109 (discussing "orders reviewable under § 717r(d)(1)"); *see also Fore River Residents Against the Compressor Station v. FERC*, --- F.4th ---, 2023 WL 4672259, *7 (D.C. Cir. July 21, 2023) (discussing the type of orders made reviewable under NGA). By focusing only on the phrase "civil action" in § 717r(d)(1) (Memorandum, R. 29, at 8, Appx13), the District Court failed to "consider the language in the context of the entire statute," *Byrd v. Shannon*, 715 F.3d 117, 123 (3d Cir. 2013), which contains the "potent language" of original and exclusive jurisdiction[17] consistent with the unmistakable implication of the

[17] *Hairston v. Travelers Cas. & Sur. Co.*, 232 F.3d 1348, 1350 (11th Cir. 2000) ("While Appellants argue that the words 'original exclusive jurisdiction' do not rebut the concurrent jurisdiction presumption, we have not found any cases that

legislative history of the NGA. The District Court ignored the remainder of § 717r(d)(1), which refers to the only type of State action permitted and not preempted by the NGA: an action by a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval … required under Federal law." 15 U.S.C. § 717r(d)(1); *Riverkeeper I*, 833 F.3d at 371. The EHB has none of that federal authority, and thus has no authority to act at all under the NGA in connection with an interstate natural gas pipeline project.

D. *Bordentown* Was Not a Preemption Case Because the NGA Does Not Preempt the Internal Procedures of a State Administrative Agency Issuing a Permit Required under Federal Law

The District Court held that the *Riverkeeper* line of cases cannot be read to "imply that ripening of a civil action for purposes of *judicial review* under Section 717r(d)(1) simultaneously divests the [EHB] of its ability to conduct *administrative review* otherwise available under Pennsylvania law," when that is exactly what they do. Memorandum, R. 29, at 11, Appx16. In *Bordentown*, this Court held only that the NGA's jurisdictional provision does not divest the NJDEP of "***its*** authority to review challenges to ***its permits*** via ***its*** established administrative procedures." *Bordentown*, 903 F.3d at 271, n.24 (emphasis added). Again, the narrow holding of

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support this view. In fact, the only cases that we have found that interpret this language held that the language confined jurisdiction to the federal courts.").

Bordentown: "Our holding is ***only*** that … the petitioners were entitled under New Jersey law to have alternatively first sought an ***intra-agency*** adjudicative hearing." *Bordentown*, 903 F.3d at 271 (emphasis added).

The reason *Bordentown* and *Berkshire* did not turn on preemption and circumvent agency hearing processes in New Jersey and Massachusetts is because those cases focused on the review procedures ***within*** the actual permitting agency. *Bordentown* instructs that additional state administrative review can be pursued only to the extent it enables the ***permitting agency*** to reach the terminus of its decision-making process. *Bordentown*, 903 F.3d at 272 (holding the NGA "does not purport to meddle with the inner workings of the agency's approval process").

The process in Pennsylvania is different. Once PADEP renders a permit decision, it has made a final decision.

E. This Court's Exclusive Jurisdiction Is Triggered Once a State Permitting Agency Concludes Its Decision-Making Process

This Court's original and exclusive jurisdiction arises once PADEP issues a permitting decision. What sets the administrative structure in Pennsylvania apart from New Jersey is that PADEP has reached the terminus of its decision-making process upon the issuance of permits. *Riverkeeper II*, 870 F.3d at 178; *Riverkeeper III*, 903 F.3d at 73. The same cannot be said for New Jersey, where there is still something NJDEP can do to "clearly articulate the reasoning behind ***its*** decision so that a reviewing court can determine whether the decision was in error."

Bordentown, 903 F.3d at 270 (emphasis added). PADEP has already done that here through, among other things, its issuance of a 210-page comment/response document in connection with the REAE Permits, which includes PADEP's response to written and oral comments raised by the EHB Appellants. *See* Transco's Memo. of Law in Support of Preliminary Injunction, R. 10, at 29, Appx297.

The District Court inappropriately concluded that the EHB Appellants may exhaust administrative remedies prior to filing a civil action. *See* Memorandum, R. 29, at 16, Appx21. "Whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 501–02 (1982). There is a "strong presumption that Congress intends judicial review of administrative action," and that "judicial review of a final agency action … will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986). This Court has never required exhaustion before reviewing PADEP's actions, as outlined in the *Riverkeeper* cases. *Cf. Pakdel v. City and County of San Francisco, Cal.*, 141 S.Ct. 2226, 2231 (2021) (exhaustion of state remedies is unnecessary when the agency "has reached a conclusive position").

Federal courts considering the NGA's legislative history have recognized that the purpose of the NGA's judicial review provision is to "streamline the review of state decisions taken under federally-delegated authority" so that "all appeals of Federal and state agency decisions that administer Federal law [are] reviewed immediately in a single U.S. Court of Appeals." *Islander E.*, 482 F.3d at 85 (quoting Testimony of J. Mark Robinson, Director of Office of Energy Projects, FERC). In that testimony, Robinson noted that prior to the enactment of § 717r(d)(1), applicants were subject to "a series of sequential ***administrative*** … ***appeals*** that [could] kill a project with a death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes." *Islander E.*, 482 F.3d at 85 (quoting Testimony of J. Mark Robinson, Director of Office of Energy Projects, FERC) (emphasis added). Section 717r(d)(1)'s plain language does not provide for exhaustion of administrative remedies before seeking review in this Court, and it would be unreasonable to allow for it once an issuing agency has reached the end of its decision-making process. The very fact that Congress granted federal appellate courts "the unusual ability to review directly (and on an expedited basis, 15 U.S.C. § 717r(d)(5)) action by a state agency can itself be seen as further evidence that Congress sought to reduce the potential for the use of delay to block natural gas projects." *Berkshire*, 851 F.3d at 109-10. And Congress expressly included an

exhaustion requirement for FERC's orders, 15 U.S.C. §§ 717r(a)-(b), but chose not to impose a similar requirement for permits issued by State agencies, § 717r(d)(1).

Decisions interpreting the Federal Telecommunications Act of 1996, which federal courts have analogized with the NGA, *see Islander E.*, 482 F.3d at 89-90, support the determination that exhaustion is not required "because the structure of the federal statute shows that Congress did not intend to incorporate varying state exhaustion requirements into federal law as a prerequisite to federal court review." *AT & T Commc'ns Sys. v. Pac. Bell*, 203 F.3d 1183, 1184 (9th Cir. 2000); *see also Berkshire*, 851 F.3d at 109 (discussing "Congress's numerous efforts to prevent states from unreasonably delaying the performance of their reserved roles in connection with natural gas projects"); *Riverkeeper III*, 903 F.3d at 74. The legislative history behind § 717r(d)(1) demonstrates that Congress did not intend for exhaustion of administrative remedies prior to raising a challenge in federal court. And neighboring provisions reflect Congress's intent for prompt decision-making. *See* 15 U.S.C. § 717r(d)(2) (providing a direct cause of action if an agency is dilatory in its review); *id.* § 717r(d)(5) (requiring expedited consideration).

V. Not Only Is Jurisdiction Over the Review of the REAE Permits Given Only to This Court, but the EHB Appeal Is Preempted under the NGA

EHB review of the REAE Permits is preempted by the NGA. As this Court has found, "[t]he Natural Gas Act preempts state environmental regulation of interstate natural gas facilities, except for state action taken under those statutes

specifically mentioned in the [NGA]: the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act." *Riverkeeper I*, 833 F.3d at 372 (citing 15 U.S.C. § 717b(d)). "In other words, the only state action over interstate natural gas pipeline facilities that [can] be taken pursuant to federal law is state action taken under [these] statutes." *Riverkeeper I*, 833 F.3d at 372. Any other state action is preempted. *See id*.; *PennEast Pipeline Co. v. Permanent Easement of 0.06 Acres in Moore Twp., Northampton Cnty., Pa.*, No. 18-505, 2019 WL 4447981, at *8 (E.D. Pa. Sept. 17, 2019).

The Supreme Court has addressed preemption under the NGA several times and outlined both field and conflict preemption in *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77 (2015):

> The Supremacy Clause provides that 'the Laws of the United States' (as well as treaties and the Constitution itself) 'shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' Art. VI, cl. 2. Congress may consequently pre-empt, i.e., invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where, as here, a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002).
>
> It may do so either through 'field' pre-emption or 'conflict' pre-emption. As to the former, Congress may have intended 'to foreclose any state regulation in the *area*,' irrespective of whether state law is consistent or inconsistent with 'federal standards.' *Arizona v. United*

> *States*, 567 U.S. ——, ——, 132 S.Ct. 2492, 2502, 183 L.Ed.2d 351 (2012) (emphasis added). In such situations, Congress has forbidden the State to take action in the field that the federal statute pre-empts.
>
> By contrast, conflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'' *California v. ARC America Corp.*, 490 U.S. 93, 100, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). In either situation, federal law must prevail.

In *Oneok,* which involved the NGA and whether state antitrust lawsuits were preempted, the Supreme Court noted that "[n]o one here claims that any relevant federal statute expressly pre-empts state antitrust lawsuits. Nor have the parties argued at any length that these state suits conflict with federal law." 575 U.S. at 377.

In contrast, here, the NGA does expressly preempt review of the REAE Permits by the EHB. The NGA grants the federal Courts of Appeal original and exclusive jurisdiction over the review of environmental permits issued by state agencies acting under federal law. The EHB does not act pursuant to federal law, *Riverkeeper III*, 903 F.3d at 72, nor does it issue permits. *See infra*, Argument § V.C. Allowing the EHB Appeals to proceed would eliminate any path to review by this Court of the limited category of federal permits that the NGA allows state agencies to issue.

"[T]he EHB's authority and jurisdiction exist pursuant to state law only." *Tenn. Gas*, 921 F. Supp. 2d at 390; *see* 35 P.S. §§ 7511–7516. The NGA therefore

preempts the EHB's usual role of reviewing PADEP-issued permits because the EHB plays no role in PADEP's issuance of a permit pursuant to federal law and because exclusive jurisdiction to review those permits is given only to the Courts of Appeals. 15 U.S.C. § 717r(d)(1); *Riverkeeper I*, 833 F.3d at 372; *cf. Nat'l Fuel Gas Supply Corp. v. Public Service Comm'n of the State of N.Y.*, 894 F.2d 571 (2d Cir. 1990) (state agency review preempted because it might delay and, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities).

The EHB's initial finding that it lacked jurisdiction under the NGA in *West Rockhill Township v. Pennsylvania Department of Environmental Protection*, EHB Docket No. 2019-039-L, 2019 WL 4896944 (Pa. Env. Hrg. Bd. Sept. 25, 2019) and *Cole v. Pennsylvania Department of Environmental Protection*, EHB Docket No. 2019-046-L (Pa. Env. Hrg. Bd. Oct. 9, 2019)[18] was correct. The same conclusion has been reached in other states that have independent state review boards. A state review board in Ohio, which has a similar review process to Pennsylvania, held that it had no jurisdiction to review federal permits issued by a state agency under federal law in an interstate natural gas pipeline project. In *Protecting Air for Waterville v. Butler*, Nos. ERAC 16-6884 and 16-6885, 2017 WL 5504540 (Ohio Envtl. Review

[18] A true and correct copy of the October 9, 2019, Order is included in the Addendum to this Brief. *See* Fed. R. App. P. 32.1(b).

Appeals Comm'n Nov. 9, 2017), the Ohio Environmental Review Appeals Commission ("ERAC") ruled that it did not have jurisdiction to review a citizen group's challenge to the Ohio EPA's issuance of a minor source air quality permit for a compressor station in connection with a FERC-regulated pipeline because the Ohio EPA issued the permit pursuant to its Federally-delegated authority under the Clean Air Act. The ERAC is "a separate, independent body established by statute to hear appeals of final agency actions" that is "distinct from the Ohio EPA." *Village of Harbor View v. Koncelik*, No. ERAC 485791, 2007 WL 5490684 *4 (Ohio Envtl. Review Appeals Comm'n May 31, 2007). And in Indiana, the U.S. District Court for the Southern District of Indiana enjoined the administrative appeal of state permits on preemption grounds because the appeal was filed with a separate state administrative agency that was not itself the permitting agency. *See Rockies Exp. Pipeline LLC v. Ind. State Nat. Res. Comm'n*, No. 1:08-CV-1651-RLY-DML, 2010 WL 3882513, at *6 (S.D. Ind. Sept. 28, 2010).

The EHB Appeal is also conflict preempted. Unlike PADEP, the EHB does not issue any permits, so it does not "issue, condition or deny" a permit "required under Federal law" for an interstate gas pipeline. 15 U.S.C. § 717r(d)(1). The EHB's orders are reviewable only in Pennsylvania's Commonwealth Court under state law. *See* 42 P.S. § 763(a)(1); *Riverkeeper III*, 903 F.3d at 72; *Adelphia Gateway, LLC v. Pa. Envtl. Hearing Bd.*, 62 F.4th 819, 827 (3d Cir. 2023). As a result, if the EHB

Appeal proceeds, it would be impossible for this Court – the sole Court that the NGA vests with "original and exclusive" jurisdiction to review such permits – to review the underlying permits issued by PADEP, as outlined in Figure 1, above. *See* 15 U.S.C. § 717r(d)(1). This irreconcilable conflict between 35 P.S. § 7514, 42 Pa.C.S. § 763(a), and the NGA presents a classic instance of conflict preemption, where federal law must prevail. *See MD Mall Assoc. v. CSX Transp., Inc.*, 715 F.3d 479, 495 (3d Cir. 2013); *Weavers Cove Energy, LLC v. R.I. Coastal Res. Mgm't Council*, 589 F.3d 458 (1st Cir. 2009) (state agency's attempt to use state law licensing program to block a FERC-approved project subject to conflict preemption); *Atl. Coast Pipeline v. Nelson Co. Bd. of Sup'rs*, 443 F. Supp. 3d 670, 677-78 (W.D. Va. 2020) (county floodplain regulations preempted as a matter of "obstacle preemption" because it is impossible to comply with conflicting state and federal requirements and where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

VI. The District Court Erred When It Concluded That Transco Would Not Be Irreparably Harmed Absent an Injunction of the EHB Appeal

As the District Court recognized, Transco's "irreparable harm argument is in lockstep with its argument on the merits[.]" Memorandum, R. 29, at 17, Appx 22. Indeed, the principal harm to Transco is being forced to expend time, energy, and resources participating in a preempted process before the EHB: the "death by a thousand cuts" which Congress sought to avoid, which cannot be undone, and for

which Transco has no adequate remedy. Transco identified other economic harms which cannot be recovered – and which are therefore irreparable – but all of Transco's harms are premised on its argument that the EHB does not have jurisdiction to review PADEP's decision to issue the REAE Permits in the first place.

The District Court, however, did not address whether participation in a preempted process such as the EHB Appeal constituted irreparable harm because the District Court had already concluded that the EHB Appeal was not preempted. Because the District Court erred when holding that the EHB Appeal was not preempted, it likewise erred by failing to consider the irreparable harm that Transco would suffer if forced to participate in that preempted process.

While neither this Court nor the Supreme Court have addressed the question whether participation in a preempted state appellate process where a federal Court of Appeals has original and exclusive jurisdiction constitutes irreparable harm for purposes of seeking a preliminary injunction, this Court did recognize that it constituted a hardship in the context of a ripeness analysis. *See NE Hub*, 239 F.3d at 342, 346. Based on that same logic, participation in a preempted state appellate process also constitutes irreparable harm for purposes of an injunction. Indeed, courts that have addressed this issue – including courts within this Circuit – concluded that it does constitute irreparable harm. *See, e.g.*, *Tenn. Gas*, 921 F. Supp. 2d at 395 ("[B]ecause the Court concludes that the EHB does not have jurisdiction

to hear appeals of the permits at issue, Plaintiff would suffer irreparable injury by being subjected to a protracted process before a body lacking in jurisdiction, and the costs associated with the *de novo* nature of the proceeding ….”); *Rockies Express Pipeline LLC v. Ind. State Natural Res. Comm’n*, Case No. 1:08-cv-1651-RLY-JMS (S.D. Ind. July 6, 2009) (granting injunction of preempted state administrative review of certificate and holding that pipeline company would be irreparably harmed by “unnecessarily expend[ing] substantial time, and financial and professional resources participating in the Administrative Action”).[19]

For the same reasons that *NE Hub* found that “the need to participate in a state regulatory process in conflict with federal policy has been recognized as a hardship,” this Court should conclude that absent an injunction, Transco is irreparably harmed by participation in the preempted EHB Appeal, especially here, where the EHB has denied a request to stay its proceedings pending the determination of this appeal. *NE Hub*, 239 F.3d at 346. If the EHB Appeal is not enjoined, the harm to Transco is irreversible as Transco will have no adequate remedy. The appeal process before the EHB cannot be undone, and any decision by the EHB will escape review by this Court, as will the underlying REAE Permits, as illustrated in Figure 1 and set forth above. Moreover, the 2005 amendments to the NGA were intended to avoid this very

[19] A true and correct copy of the July 6, 2009, Order granting preliminary injunction is included in the Addendum to this Brief. *See* Fed. R. App. P. 32.1(b).

harm as Congress recognized that state administrative appeals, such as the EHB Appeal, subject pipeline operators like Transco to a "death by a thousand cuts." *Islander E.*, 482 F.3d at 85. Absent an injunction, Transco would be deprived of receiving the benefit of the NGA's streamlined procedure for review of any federal authorizations for the Project under the NGA, for which there is no remedy. Transco cannot recover the time, energy, and resources it will be forced to expend in the EHB Appeal, and likewise has no basis to recover monetary damages against the EHB or the EHB Appellants. The only way to contain the harm to Transco is through immediate injunctive relief, and the District Court recognized that such harm, if present, would be irreparable. *See* Memorandum, R. 29, at 17, Appx 22 (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989)).

Additionally, although the District Court was correct to recognize that the "required showings on irreparable harm and likelihood of success are correlative: that is, the weaker a plaintiff's merits showing, the more is required in the way of irreparable harm, and vice versa," the District Court erred by finding that this required Transco to make a stronger showing of irreparable harm because Transco had not demonstrated that the EHB lacked jurisdiction. Memorandum, R. 29, at 17-18, Appx22-23. Instead, because the EHB lacks jurisdiction to review PADEP's issuance of the REAE Permits and the EHB Appeal is preempted as a matter of law, *less* is required in the way of irreparable harm. By demonstrating that the EHB

Appeal is preempted, and that it will have no remedy or ability to recover monetary damages if the EHB Appeal is allowed to proceed, Transco has shown that it will be irreparably harmed by participation in the process alone.

Not only that, but if the EHB issues an adjudication which has the effect of revoking the REAE Permits, or requires PADEP to make modifications to the REAE Permits requiring work that would otherwise not be required by FERC, Transco will be without any path to appeal that decision to the proper court – *this* Court. The EHB is not a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law" and thus its decision is not one over which this Court has jurisdiction.

Deviating from the express language of the NGA, and this Court's holdings in the *Riverkeeper* cases with respect to PADEP permitting decisions, allows the EHB Appellants to delay and negatively impact interstate natural gas pipeline projects approved by FERC by inserting an additional, lengthy, and unnecessary appeal process before the EHB, and would eliminate Transco's ability to appeal any decision of the EHB to the proper court. *See Solebury Twp. v. PADEP*, No. 2002-323-L, 2008 WL 5426378, at *6 (Pa. EHB Dec. 23, 2008) ("EHB appeals have a tendency to grind on for years. Litigation before the Board can be every bit as complicated as complex litigation in state or federal court.").

With respect to the unrecoverable financial impacts to Transco – both for the cost of being subjected to the EHB Appeal and the potential consequences if the EHB Appeal prevents or otherwise delays the Project – this Court has held that "[t]he irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484–85 (3d Cir. 2000) (citations omitted). Accordingly, a plaintiff would be irreparably harmed by monetary damages when there is no means to recover those damages. *See Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991), *cert. denied,* 502 U.S. 1032 (1992) (legal remedies are inadequate where sovereign immunity under the Eleventh Amendment bars the recovery of monetary damages from state entities).

Indeed, Courts within this Circuit have repeatedly found that monetary damages constitute irreparable harm when they cannot be recovered. *See, e.g.*, *Cigar Ass'n of Am. v. City of Philadelphia*, 500 F. Supp. 3d 428, 436-37 (E.D. Pa. Nov. 13, 2020) (finding irreparable harm where Eleventh Amendment immunity would prohibit plaintiffs from recovering monetary damages against city for preemption claim), *aff'd sub nom. Cigar Ass'n of Am., Inc. v. City of Philadelphia*, No. 20-3519, 2021 WL 5505406 (3d Cir. Nov. 24, 2021); *Marland v. Trump*, 498 F. Supp. 3d 624, 641–42 (E.D. Pa. 2020) (finding irreparable harm where none of plaintiffs' claims would support award of money damages). Other courts are in accord, particularly

when additional, unrecoverable costs are incurred. *See Sabal Trail Transmission, LLC v. +/- 0.41 Acres of Land*, Case No. 3:16-cv-274-TJC-JBT, 2016 WL 3188985, at *4 (M.D. Fla. June 8, 2016) (collecting cases); *N. Border Pipeline Co. v. 64.111 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000); *Columbia Gas Transmission LLC v. 0.85 Acres*, Civ. No. WDQ-14-2288, 2014 WL 4471541, at *6 (D. Md. Sept. 8, 2014); *Perryville Gas Storage LLC v. 40 Acres of Land*, Civ. A. No. 3:11-cv-1635, 2011 WL 4943318, at *3 (W.D. La. Oct. 17, 2011).

That is the case here. Transco will incur more than just unrecoupable litigation costs if forced to participate in a preempted appeal process before the EHB – as its employees will have to divert time and energy to the EHB Appeal instead of to the Project, and Transco will be denied the benefit of the streamlined review process mandated by the NGA to avoid such impacts. Transco also will have no avenue to recover monetary damages from Appellees for those harms if it prevails on the merits of its preemption claim. As in the foregoing cases, Transco has no means to recover money damages, as it has no private cause of action for damages against the EHB or the individual members of the EHB named as defendants in the District Court based on the filing of the EHB Appeal, and the EHB Appellants are immune from any civil liability for instituting the EHB Appeal pursuant to Pennsylvania's Environmental Immunity Act, as well as the Noerr-Pennington doctrine. *See* 27 P.S. § 8302; *Penllyn Greene Assocs., L.P. v. Clouser*, 890 A.2d 424, 433–34 (Pa. Commw. Ct. 2005);

O'Neill v. Rossum, No. 3066 EDA 2017, 2018 WL 4233573, at *9 (Pa. Super. Ct. Sept. 6, 2018) (affirming dismissal of complaint because the Delaware Riverkeeper Network had immunity pursuant to Noerr-Pennington doctrine). For the additional reason that Transco cannot recover monetary damages from any of Appellees for its claims, Transco has met its burden of demonstrating irreparable harm.

Finally, any delay in placing the Project into service would irreparably harm Transco. *See* Declaration of Su-Lin Jaaskelainen, ¶¶ 34-38.[20] As detailed in the Jaaskelainen Declaration, the pipeline is constructed in linear segments with crews proceeding sequentially in assembly-line fashion along the construction corridor. Construction is subject to time sensitive and interdependent restrictions intended to protect the environment and minimize environmental impacts, which requires Transco to maintain a detailed construction schedule to place the Project into service as soon as commercially practicable. Transco could incur significant additional costs if that schedule is impacted, and any delay would result in significant revenue loss which cannot be recovered. Transco's shippers have also expressed their need to

[20] The Declaration of Su-Lin Jaaskelainen was submitted to the United States Court of Appeals for the D.C. Circuit in opposition to an Emergency Motion for Stay filed by Project opponents at Case No. 23-1064, and is a matter of public record. *See New Jersey Conservation Foundation, et al. v. FERC*, No. 23-1064, Doc. 1991270, Addendum B (D.C. Cir. Mar. 22, 2023). That case is a consolidated appeal of various petitions for review of orders issued by FERC in connection with the Project, including an appeal filed by the Delaware Riverkeeper Network, in accordance with the NGA's exclusive review provisions.

have as much of the Project capacity as possible in service for the 2023-24 winter heating season and will begin utilizing that capacity immediately. Any delays in construction as a result of any action taken by the EHB would likewise jeopardize Transco's construction schedule and its ability to place any Project capacity in service for the upcoming winter heating season.

An injunction is therefore necessary to prevent immediate and irreparable harm from the EHB being permitted to maintain jurisdiction over the review of the REAE Permits in the EHB Appeal and to proceed with a hearing of any kind or to render a decision on any issue in the EHB Appeal. Although the EHB lacks jurisdiction to stay construction of the Project, Transco cannot risk the EHB attempting to take any such action that would delay construction, such as a stay of the REAE Permits.

VII. The Balance of Harm and Public Interest Factors, Which the District Court Did Not Reach, Likewise Favor Injunctive Relief

Because the District Court incorrectly held that Transco had not demonstrated a likelihood of success on the merits or irreparable harm, it did not reach the final two factors of the preliminary injunction analysis: potential harm to other interested parties and the public interest. Both factors weigh in favor of an injunction, so this Court should reverse the District Court and remand with instructions to enter a preliminary injunction enjoining the EHB Appeal.

A. Other Interested Parties Will Not Suffer Harm if the EHB Appeal Is Enjoined

The EHB Appellants continue to have the right to appeal the issuance of the REAE Permits in the proper forum, this Court, and thus cannot suffer any harm from an injunction enjoining the EHB Appeal. The EHB Appellants cannot claim harm from the enforcement of federal law to stay a jurisdictionally-barred appeal. *Cf. Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114-15 (2d Cir. 2005) (enforcement of statutes does not constitute harm).

In addition to the appeal to this Court that the EHB Appellants may still pursue, FERC and various federal and state agencies, including PADEP, have already considered and addressed potential environmental impacts of the Project.[21] So there is no risk of environmental harm if the EHB Appeal is enjoined and the EHB Appellants are unable to seek relief before that tribunal. *See Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998) (granting injunction where alleged consequences were speculative and there was no record that other interested parties would actually suffer substantial harm).

[21] FERC conducted an exhaustive review and concluded that potential "impacts would be reduced to less than significant levels through implementation of Transco's proposed avoidance, minimization, and mitigation measures and [FERC] staff recommendations." Certificate Order, ¶ 51, Appx217. Additionally, PADEP issued a 210-page comment/response document in connection with the REAE Permits, which includes PADEP's response to the EHB Appellants' comments.

Accordingly, this factor weighs in favor of enjoining the EHB Appeal.[22]

B. Enjoining the EHB Appeal Serves the Public Interest

By issuing the Certificate Order, FERC already determined that the Project serves the national public interest pursuant to the public convenience and necessity standard of NGA Section 7(c). *See* Certificate Order, ¶ 82, Appx233. Thus, enjoining the EHB Appeal serves the public interest by allowing Transco to proceed with this important public project without delay or the threat of the EHB interfering with the REAE Permits or attempting to interfere with the ongoing construction of the Project. *See Eli Lilly & Co. v. Premo Pharm. Lab'ys, Inc.*, 630 F.2d 120, 138 (3d Cir. 1980) (affirming grant of preliminary injunction, explaining that "the decision to grant the preliminary injunction would serve the public interest as it has been defined by Congress").

Finally, an injunction will vindicate Congress' express intent to provide federal Courts of Appeals with original and exclusive jurisdiction over permitting actions like this one, in order to "streamline the review" of agency decisions. *See Del. Riverkeeper I*, 833 F.3d at 372; *see also Tenn. Gas*, 921 F. Supp. 2d at 391-92

[22] Transco is willing to post a nominal bond, or in such other amount as determined by this Court to be proper, as security to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. *See Marland*, 498 F. Supp. 3d at 644–45 (waiving bond requirement for entry of preliminary injunction because there was no evidence that the government would suffer monetary harm from the injunction, and plaintiffs were seeking "to further the public interest by enjoining unlawful agency action").

(NGA § 717r(d) was enacted because applicants "were encountering difficulty proceeding with natural gas projects that depended on obtaining state agency permits" and "NGA applicants were subject to a series of sequential administrative . . . appeals that [could] kill a project with a death by a thousand cuts") (quoting *Islander E.*, 482 F.3d at 85). Allowing the EHB Appeal to proceed would directly contravene Congressional intent.

Thus, an injunction will protect Congress' policy choices, which, in turn, promotes the public interest that Congress represents. *See Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 976 (N.D. Cal. 2021) (noting strong public interest in promoting Congressional intent weighed in favor of injunctive relief); *K.G. ex rel. Garrido v. Dudek*, 839 F. Supp. 2d 1254, 1279 (S.D. Fla. 2011) (holding that public interest weighed in favor of injunction, explaining that "[i]n assessing the public interest, courts may look to congressional intent"); *Johnson v. U.S. Dept. of Agriculture*, 734 F.2d 774, 788 (11th Cir. 1984) (stating that "Congressional intent and statutory purpose can be taken as a statement of public interest"); *cf. Coal. of Arizona/New Mexico Ctys. for Stable Econ. Growth v. United States Fish & Wildlife Serv.*, No. CV 03-508 MCA/LCS, 2004 WL 7337667, at *22 (D.N.M. July 6, 2004) (holding that injunctive relief would be contrary to the public interest because it went against the congressional intent expressed in the Endangered Species Act).

For both of these reasons, the public interest favors enjoining the EHB Appeal.

CONCLUSION AND RELIEF REQUESTED

Transco respectfully requests that the Court reverse the District Court's order and remand with instructions to enter a preliminary injunction enjoining: (1) the EHB from considering the EHB Appeal; and (2) EHB Appellants from seeking any other relief from the EHB with respect to the REAE Permits.

Respectfully submitted this 30th day of August, 2023.

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CERTIFICATE OF BAR ADMISSION

3d Cir. L.A.R. 28.3(d) Bar Membership Certification

Pursuant to Third Circuit Local Rule of Appellate Procedure 28.3(d), Appellant Transcontinental Gas Pipe Line Company, LLC hereby certifies that Elizabeth U. Witmer, John F. Stoviak, Andrew T. Bockis, Patrick F. Nugent, and Sean T. O'Neill of Saul Ewing LLP are members of the bar of this Court.

Dated: August 30, 2023

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE OF APPELLATE PROCEDURE 31.1(C)

I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains **12,733** words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the

paper copies, and the SentinelOne 22.3.5.887 has been run on the file containing the electronic version of this brief and no viruses have been detected.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that a copy of the foregoing Brief with Addendum and Joint Appendix Volume 1 was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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ADDENDUM

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FEDERAL STATUTES

15 U.S.C. § 717b Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas--

(1) the importation of such natural gas shall be treated as a "first sale" within the meaning of section 3301(21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) Expedited application and approval process

For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under--

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall--

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b-1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an

application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find[1] necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not--

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on--

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) Military installations

(1) In this subsection, the term "military installation"--

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense,

including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult[2] with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

Footnotes

[1]So in original. Probably should be "finds".

[2]So in original. Probably should be "coordinates and consults".

15 U.S.C. § 717n Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term "Federal authorization"--

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall--

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the

schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for--

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality

in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

15 U.S.C. § 717r Rehearing and Review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the

record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as

"permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title , the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

28 U.S.C. § 1292 Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

(1) of an appeal from an interlocutory order or decree described in subsection (a)

or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of

the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

33 U.S.C. § 1341 Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or,

if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance

with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the

case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal

licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

FEDERAL RULES

Fed. R. App. P. 4 Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

Fed. R. App. 32.1 Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Fed. R. Evid. 201 Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

STATE STATUTES

27 P.S. § 8302 Immunity

(a) General rule.--Except as provided in subsection (b), a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting

legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action.

(b) Exceptions.--A person shall not be immune under this section if the allegation in the action or any communication to the government is not relevant or material to the enforcement or implementation of an environmental law or regulation and:

(1) the allegation in the action or communication is knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity;

(2) the allegation in the action or communication is made for the sole purpose of interfering with existing or proposed business relationships; or

(3) the oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation is later determined to be a wrongful use of process or an abuse of process.

35 P.S. § 7511 Short title

This act shall be known and may be cited as the Environmental Hearing Board Act.

35 P.S. § 7512 Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The Environmental Hearing Board of the Commonwealth.

"Department." The Department of Environmental Resources of the Commonwealth.

"Rules committee." The Environmental Hearing Board Rules Committee established under section 5.

"Secretary." The Secretary of Environmental Resources of the Commonwealth.

35 P.S. § 7513 Board

(a) Establishment.--The Environmental Hearing Board is established as an independent quasi-judicial agency.

(b) Membership.--The board shall consist of five members. The members shall be full-time administrative law judges. Members shall devote full time to their official duties. No member or hearing examiner shall hold any office or position, the duties of which are incompatible with the duties of his office, or be engaged in any business, employment or vocation for which he shall receive any remuneration, except that members may speak, write or lecture if any reimbursed expenses, honorariums, royalties or other moneys received in connection with these activities are disclosed. Members shall be appointed by the Governor with the consent of a majority of the members elected to the Senate. Members of the board on the effective date of this act may complete their terms and continue in office until their successors are appointed and qualified.

(c) Chairperson.--The Governor shall designate one member of the board to serve as chairperson.

(d) Terms.--A member of the board shall serve for a term of six years or until a successor is appointed and qualified. One of the additional members appointed under this act shall serve an initial term of four years. Vacancies shall be filled in the same manner as the original appointment.

(e) Qualifications.--A member of the board must:

(1) Be an attorney in good standing before the Bar of the Supreme Court of Pennsylvania.

(2) Have five years of practice before administrative agencies or have equivalent experience.

(f) Staff and facilities.--The board shall appoint a secretary to the board. The board shall provide facilities at each seat under the provisions of section 6. The board may employ hearing examiners and such additional personnel necessary to exercise its

functions. Hearing examiners shall be attorneys in good standing before the Bar of the Supreme Court of Pennsylvania and shall have three years of practice before administrative agencies or equivalent experience. All employees of the board shall be subject to the act of August 5, 1941 (P.L. 752, No. 286), known as the Civil Service Act.[1]

(g) Salary.--Members of the board and the chairperson shall receive the same salaries, respectively, as the commissioners and the chairman of the Pennsylvania Public Utility Commission.

Footnotes

[1]71 P.S. § 741.1 et seq.

35 P.S. § 7514 Jurisdiction

(a) General rule.--The board has the power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the department.

(b) Powers continued.--The board shall continue to exercise the powers to hold hearings and issue adjudications which (powers) were vested in agencies listed in section 1901-A of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.[1]

(c) Departmental action.--The department may take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person.

(d) Supersedeas.--

(1) No appeal shall act as an automatic supersedeas. The board may, however, grant a supersedeas upon cause shown. The board, in granting or denying a

supersedeas, shall be guided by relevant judicial precedent and the board's own precedent. Among the factors to be considered are:

(i) Irreparable harm to the petitioner.

(ii) The likelihood of the petitioner prevailing on the merits.

(iii) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(2) A supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

(3) The board shall promulgate regulations for issuance or denial of a temporary supersedeas.

(e) Intervention.--Any interested party may intervene in any matter pending before the board.

(f) Subpoenas.--The board may subpoena witnesses, records and papers. The board may enforce its subpoenas in Commonwealth Court. Commonwealth Court, after a hearing, may make an adjudication of contempt or may issue another appropriate order.

(g) Procedure.--Hearings of the board shall be conducted in accordance with the regulations of the board in effect at the effective date of this act until new regulations are promulgated under section 5.

(h) Voluntary mediation.--Subject to board approval, parties to any proceeding may request permission to utilize voluntary mediation services to resolve the dispute or narrow the areas of difference. If the board approves, the hearing shall be continued until the parties report the results of the mediation. If the parties accept the mediation report and the result is consistent with State and Federal environmental

laws, then the board may enter the settlement as its decision. If mediation is unsuccessful, then the hearing shall be rescheduled and conducted in accordance with the provisions of law.

Footnotes

[1]71 P.S. § 510-1.

35 P.S. § 7515 Rules committee

(a) Establishment.--The Environmental Hearing Board Rules Committee is established. The rules committee shall consist of nine attorneys who are in good standing before the Bar of the Supreme Court of Pennsylvania and who have practiced before the board for a minimum of three years or who have comparable experience. One member shall be appointed by the President pro tempore and one member shall be appointed by the Minority Leader of the Senate. One member shall be appointed by the Speaker and one member shall be appointed by the Minority Leader of the House of Representatives. One member shall be appointed by the Chairman of the Citizens Advisory Council to the department. Two members shall be appointed by the Governor, upon the advice of the Pennsylvania Bar Association. Two members shall be appointed by the secretary. The initial appointments of the Governor and the secretary shall serve terms of one year; the initial appointments of the President pro tempore and Minority Leader of the Senate, the Speaker and Minority Leader of the House of Representatives and the Chairperson of the Citizens Advisory Council shall serve terms of two years commencing three months after the effective date of this act. Thereafter, members of the rules committee shall serve terms of two years and may be reappointed for additional terms. Such vacancies as may arise shall be filled in the same manner as the original appointment. The chairperson of the board shall be a member of the committee ex officio.

(b) Expenses.--The board shall reimburse members of the rules committee for necessary and reasonable expenses incurred in attending rules committee meetings.

(c) Function.--The rules committee shall recommend to the board regulations for hearings conducted by the board and for the use of mediation under section 4(h). The regulations shall include time limits and procedure for the taking of appeals and

locations of hearings. Regulations under this subsection shall be promulgated by the board upon a majority affirmative vote on the recommended regulations.

(d) Bylaws.--The rules committee shall adopt bylaws to govern the conduct of its affairs.

35 P.S. § 7516 Seats of the board

(a) Location.--The board shall have offices and hearing rooms in Harrisburg and Pittsburgh and, at the discretion of the board, Philadelphia. The headquarters of the board shall be in Harrisburg. The board may hear cases at other locations in this Commonwealth.

(b) Assignments.--At least one member of the board shall sit in each seat of the board. The remaining two members of the board shall be assigned to a seat by the chairperson.

The chairperson shall, within 60 days of the effective date of this act, establish either:

(1) a rotation schedule involving the movement of board members among the three hearing sites; or

(2) a case assignment schedule which will assign cases to board members from outside their regional location.

42 P.S. § 763 Direct appeals from government agencies

(a) General rule.--Except as provided in subsection (c), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:

(1) All appeals from Commonwealth agencies under Subchapter A of Chapter 7 of

Title 2 (relating to judicial review of Commonwealth agency action) or otherwise and including appeals from the Board of Claims, the Environmental Hearing Board, the Pennsylvania Public Utility Commission, the Unemployment Compensation Board of Review and from any other Commonwealth agency having Statewide jurisdiction.

(2) All appeals jurisdiction of which is vested in the Commonwealth Court by any statute hereafter enacted.

(b) Awards of arbitrators.--The Commonwealth Court shall have exclusive jurisdiction of all petitions for review of an award of arbitrators appointed in conformity with statute to arbitrate a dispute between the Commonwealth and an employee of the Commonwealth. The petition for review shall be deemed an appeal from a government unit for the purposes of section 723 (relating to appeals from Commonwealth Court) and Chapter 55 (relating to limitation of time).

(c) Exceptions.--The Commonwealth Court shall not have jurisdiction of such classes of appeals from government agencies as are:

(1) By section 725 (relating to direct appeals from constitutional and judicial agencies) within the exclusive jurisdiction of the Supreme Court.

(2) By section 933 (relating to appeals from government agencies) within the exclusive jurisdiction of the courts of common pleas.

STATE REGULATIONS

25 Pa. Code § 105.15 Environmental assessment

(a) A person may not construct, operate, maintain, modify, enlarge or abandon the following categories of structures or activities until an Environmental Assessment has been approved in writing by the Department. The Environmental Assessment must be on a form provided by the Department and include the following information:

(1) For dams, water obstructions or encroachments permitted under this chapter, the Department will base its evaluation on the information required by § 105.13 (relating to permit applications--information and fees) and the factors included in § 105.14(b) (relating to review of applications) and this section.

(2) For dams, water obstructions or encroachments located in, along or projecting into a wetland for which a permit is not otherwise required under this chapter, the Department will base its evaluation on the information required by § 105.13(d) and the factors included in § 105.14(b) and this section.

(3) For dams located in, along or projecting into an exceptional value water as defined in Chapter 93 (relating to water quality standards) for which a permit is not otherwise required under this chapter, the Department will base its evaluation on the information required by the factors included in Chapter 93 and §§ 105.13(d) and 105.14(b) and the following information submitted by the applicant:

(i) The surface area of the impoundment.

(ii) The height of the dam.

(iii) The mean depth and maximum depth of the stream at the location of the dam.

(iv) A description of the release structure.

(v) The rate of a conservation release.

(vi) The design of bypass structures.

(vii) The use of the dam.

(viii) The material used for construction of the dam.

(b) For structures or activities where water quality certification is required under section 401 of the Clean Water Act (33 U.S.C.A. § 1341), an applicant requesting water quality certification under section 401 shall prepare and submit to the Department for review, an environmental assessment containing the information required by subsection (a) for every dam, water obstruction or encroachment located in, along, across or projecting into the regulated water of this Commonwealth.

(c) Based on the results of the environmental assessment required under subsection (a), the Department may require the applicant to undertake further studies and submit additional information, analyses and reports as found necessary by the Department.

(d) The environmental assessment has been conducted by the Department for all general permits, categories of structures and activities listed in § 105.12(a)(1)--(10) and (12)--(15) (relating to waiver of permit requirements). The environmental assessment has also been conducted for the structures or activities listed in § 105.12(b) or for which water quality certification has been granted for a Nationwide permit regulating the structure or activity and the environmental assessment requirements have been deemed satisfied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLIFF COLE, PAMELA WEST, BRIAN WEIRBACH, CATHY WEIRBACH, TODD SHELLY AND CHRISTINE SHELLY	:	
v.	:	**EHB Docket No. 2019-046-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ADELPHIA GATEWAY, LLC	:	

O R D E R

AND NOW, this 9th day of October, 2019, upon consideration of Adelphia Gateway's motion to dismiss, and the Appellants' response in opposition thereto, and in light of the Board's decision in *West Rockhill Township v. DEP*, EHB Docket No. 2019-039-L (Opinion and Order on Motion to Dismiss, Sep. 25, 2019) finding that the U.S. Court of Appeals for the Third Circuit has original and exclusive jurisdiction to review Department-issued permits required under federal law for interstate natural gas pipeline projects, it is hereby ordered that this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

s/ Thomas W. Renwand
THOMAS W. RENWAND
Chief Judge and Chairman

s/ Michelle A. Coleman
MICHELLE A. COLEMAN
Judge

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

s/ Steven C. Beckman
STEVEN C. BECKMAN
Judge

DATED: October 9, 2019

c: **For the Commonwealth of PA, DEP:**
Jessica Hunt, Esquire
(*via electronic filing system*)

For Appellants:
Michael D. Fiorentino, Esquire
(*via electronic filing system*)

For Permittee:
Andrew T. Bockis, Esquire
John R. Dixon, Esquire
John P. Englert, Esquire
(*via electronic filing system*)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROCKIES EXPRESS PIPELINE LLC,	)	
Plaintiff,	)	
	)	
vs.	)	**CAUSE NO.:**
	)	**1:08-cv-1651-RLY- JMS**
	)	
INDIANA STATE NATURAL RESOURCES COMMISSION,	)	
Defendant,	)	
	)	
And	)	
	)	
ELROD WATER COMPANY, d/b/a HOOSIER HILLS REGIONAL WATER DISTRICT,	)	
Defendant-Intervenor.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING PRELIMINARY INJUNCTION

This matter is before the Court on the *Motion for Temporary Restraining Order and Preliminary Injunction* (Docket Entry No. 13) filed by Plaintiff Rockies Express Pipeline LLC ("REX"). REX's motion seeks, pending a ruling on the relief sought in REX's *Complaint for Declaratory Judgment, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction* (Docket Entry No. 1), to have Defendant Indiana State Natural Resources Commission ("NRC") enjoined from taking any actions in furtherance of an administrative review docketed as its Administrative Cause No. 08-027W (the "Administrative Action"). The subject of the Administrative Action is a

Certificate of Approval issued to REX by the Indiana Department of Natural Resources ("DNR").

The Court held an evidentiary hearing on REX's request for injunctive relief on April 10, 2009. At the hearing REX presented the testimony of three witnesses – Mr. John Gasper, Mr. James Thompson and Mr. Kerry Malone. The testimony of each of REX's witnesses, together with exhibits each sponsored, was admitted in evidence with the exception of legal conclusions contained in the affidavit sponsored by Mr. Malone. Neither Defendant NRC nor Intervenor Elrod Water Company d/b/a Hoosier Hills Regional Water District ("Hoosier Hills") presented any witness testimony or exhibits.

Having considered the evidence presented at that hearing, the submissions of the parties, the arguments of counsel and the file herein, the Court, being duly advised, now enters the following findings of fact, conclusions of law and Order.

FINDINGS OF FACT

1. REX is constructing an underground natural gas pipeline, commonly known as "REX EAST," that will extend from Audrain County, Missouri to Monroe County, Ohio.

2. REX applied for and received from the Federal Energy Regulatory Commission ("FERC") a Certificate of Public Convenience and Necessity for REX EAST (the "FERC Certificate") pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. § 717f.

3. The FERC Certificate conditioned the certificate authority issued in Ordering Paragraph (A) on, *inter alia,* the following:

> (1) Rockies Express' completing the authorized construction of the proposed facilities and making them available for service within 18 months of the date of the

order in this proceeding pursuant to section 157.20(b) of the Commission's regulations;

(FERC Certificate, Ordering ¶ B(1).)

4. FERC also determined the appropriate route for REX EAST in the FERC Certificate and concluded that construction and operation of REX EAST along its approved route would have limited adverse environmental impacts. (FERC Certificate, ¶ 191.) FERC, however, conditioned the FERC Certificate on REX undertaking special mitigation efforts identified in Appendix E to the FERC Certificate to further reduce the environmental impact of REX EAST. (FERC Certificate, ¶ 191 & Ordering ¶ B(1).)

5. REX accepted all of the conditions imposed by FERC on the FERC Certificate, including without limitation those contained in its Appendix E.

6. Intervenor Hoosier Hills was a party to the FERC proceedings and opposed issuance of the FERC Certificate to the extent the FERC-approved route placed REX EAST in its wellhead protection area located in the vicinity of the Whitewater River in Franklin County, Indiana.

7. The FERC Certificate required certain special mitigation measures be taken in connection with construction in the area of the Whitewater River, including without limitation consulting with Intervenor Hoosier Hills regarding a required water monitoring plan. (FERC Certificate, ¶¶ 111, 117; Appendix E, ¶ 57.)

8. FERC re-addressed the environmental impact of REX EAST on the Whitewater River and its aquifer at Hoosier Hills' request and, on November 10, 2008, re-affirmed its previous findings that the special mitigation requirements it had imposed in the FERC Certificate were adequate, but increased the duration of some of those efforts in order to reflect changed circumstances.

9. The FERC Certificate required REX to have cooperated with state and local authorities as part of the process of securing the FERC Certificate. (FERC Certificate, ¶ 192.) Consistent with that requirement, REX had obtained from DNR a Certificate of Approval determining that construction of REX EAST in the vicinity of the Whitewater River (the "Whitewater Construction") conformed to the requirements of Indiana Code § 14-28-1-1 *et seq*. and imposing certain conditions on the Whitewater Construction. DNR issued its Certificate of Approval on January 23, 2008, and subsequently amended it by a letter dated April 21, 2008 (together, the "DNR Certificate"). REX did not object to the conditions of the DNR Certificate of Approval.

10. Intervenor Hoosier Hills and the Franklin County Drainage Board requested Defendant NRC to conduct the Administrative Action and "reverse" DNR's approval of the Whitewater Construction. Defendant NRC granted the requests for it to conduct the Administrative Action.

11. By motion, REX sought the dismissal of the Administrative Action on the grounds that Federal law preempted the NRC's administrative review of the DNR Certificate.

12. On September 24, 2008, the Administrative Action's presiding administrative law judge issued an order denying REX's motion, ruling, *inter alia*, that "REX's obligation to apply for and obtain approval of [Floodway Construction Permit #] FW-24514 from the Department pursuant to I.C. §§ 14-28 cannot be severed from its obligation to submit to the Commission's authority to conduct administrative review pursuant to §§ 4-21.5 of the Department's approval of FW-24514." (*Memorandum in*

Support of Motion for Temporary Restraining Order and Preliminary Injunction (Docket No. 14) at Attachment I-58.)

13. Intervenor Hoosier Hills conducted discovery through the remainder of 2008, and on January 27, 2009, the presiding administrative law judge scheduled an evidentiary hearing for the week of April 13, 2009.

14. By a letter dated February 24, 2009, FERC released REX to commence the Whitewater Construction and increased the special mitigation efforts that FERC previously required REX to undertake in the FERC Certificate.

15. As of April 10, 2009, REX had completed a substantial portion of the Whitewater Construction.

16. The targeted in-service date for REX EAST at its Ohio terminus is in November of 2009. However, REX EAST is scheduled to be in service at a natural gas delivery point located approximately 40 miles east of the Indiana border with Ohio, on June 15, 2009. REX must complete the Whitewater Construction in order that REX EAST can be in service at that delivery point by June 15, 2009.

CONCLUSIONS OF LAW

1. In order to obtain a preliminary injunction, a party must establish (i) it is reasonably likely to succeed on the merits; (ii) it does not have an adequate remedy at law; (iii) it will suffer irreparable harm during the pendency of the action in the absence of a preliminary injunction which outweighs any harm to Defendants; and (iv) the injunction will not harm the public interest.

2. While not reaching a final determination on the relief sought in REX's *Complaint for Declaratory Judgment, Temporary Restraining Order, Preliminary*

Injunction and Permanent Injunction (Docket Entry No. 1), REX is highly likely to succeed on the merits in demonstrating that Federal law preempts Defendant NRC's state law authority to proceed with the Administrative Action.

3. It will be impossible for REX to comply with both the FERC Certificate and the requirements of Indiana Code § 14-28-1-1 *et seq.*, under which the DNR Certificate was obtained, if Defendant NRC grants the only relief requested of it and invalidates the FERC Certificate. Moreover, even if the Administrative Action does not directly conflict with the FERC Certificate, Defendant NRC will necessarily have to act as part of the Administrative Action within a field of regulation over which FERC has exclusive jurisdiction under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* It appears, therefore, that the Administrative Action is subject to preemption under both its "conflict" and "field" branches.

4. Nothing in the FERC Certificate modifies the potential preemptive effect of Federal law on the Administrative Action. The FERC Certificate only required REX to "file" a copy of the DNR Certificate with FERC (FERC Certificate, Appendix E, ¶ 78), and imposes no requirement for an administrative review or its issuance. While the FERC Certificate also encouraged REX's cooperation with Indiana authorities in order to provide them with input into the construction of REX EAST, REX's receipt of the DNR Certificate would appear to have satisfied that policy, especially since Indiana Code § 14-28-1-22(f) only confers on DNR, not Defendant NRC, authority to impose conditions on permits such as the DNR Certificate. Finally, concluding that the FERC Certificate implicitly authorizes the Administrative Action is contrary to FERC's decision to release REX to commence the Whitewater Construction while knowing that the Administrative

Action was pending and scheduled for hearing. Again, it appears highly likely that REX will succeed on the merits in demonstrating that Federal law preempts Defendant NRC's administrative review of the DNR Certificate.

5. If the requested preliminary injunction is not issued and it is later determined that Federal law preempts the Administrative Action, REX and the other parties to the Administrative Action will have unnecessarily expended substantial time, and financial and professional resources participating in the Administrative Action. Further, REX's management and consultants participating at the scheduled hearing in the Administrative Action would be unnecessarily distracted from performing essential services and interfere with the timely completion of the Whitewater Construction.

6. The failure to complete the Whitewater Construction in a timely manner increases the likelihood that REX will not meet the FERC-imposed construction deadline and jeopardizes its ability to meet in-service dates relied upon by shippers expecting to use REX EAST, as well as the broader natural gas market. Delay also will impact the general public.

7. The irreparable harm that Defendant NRC's assertion of authority creates is underscored by the fact that a state agency's attempt to regulate in a field preempted by Federal law improperly exposes a regulated entity, like REX, to regulation by more than one regulator.

8. The above-described harms to REX are not compensable by monetary damages and are irreparable.

9. REX has no adequate remedy at law under the circumstances presented. Unless Defendant NRC is enjoined from continuing to conduct the Administrative

Action, which REX has shown is highly likely to be preempted by Federal law, REX will continue to suffer irreparable harm.

10. It cannot be concluded that Defendant NRC will suffer any cognizable harm as a result of an injunction issuing. As concluded above, it is highly likely that Federal law preempts the Administrative Action and, even if the Court ultimately finds it is not, the requested injunction would only delay, not prevent, continuation of proceedings in the Administrative Action. Similarly, forestalling Intervenor Hoosier Hills' attempt to accomplish through the Administrative Action what it failed to accomplish before FERC, does not present a cognizable harm sufficient to outweigh the harm REX would suffer without injunctive relief. This is especially true since, even if the requested injunction was not issued, it is likely the Whitewater Construction, the work Intervenor Hoosier Hills is seeking to stop through the Administrative Action, would be completed before the Administrative Action was completed and all appeals exhausted.

11. Enjoining Defendant NRC's exercise of continuing jurisdiction and authority to conduct the Administrative Action will serve the public interest by promoting the effective and timely completion of REX EAST, a project which FERC already has determined to be in the public interest.

12. Under Rule 65(c) of the Federal Rules of Civil Procedure, this Court may require REX to post a bond as security to protect Defendant NRC and Intervenor Hoosier Hills against the reasonable damages they may directly suffer from the delay in the completion of the Administrative Action that issuance of the requested injunctive relief directly causes.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff's request for a preliminary injunction is granted and that, pending a final ruling on the relief sought in Plaintiff REX's *Complaint for Declaratory Judgment, Temporary Restraining Order, Preliminary Injunction And Permanent Injunction* (Docket Entry No. 1), Defendant NRC, its members, employees and those in active concert or participation with them are enjoined and shall refrain and desist from taking any actions in furtherance of the Administrative Action including without limitation conducting any evidentiary hearings such as the hearing scheduled to commence on April 13, 2009 or thereafter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff Rockies Express Pipeline LLC be and is hereby directed to file a bond with the Court in the amount of Two Hundred and Fifty Thousand Dollars ($250,000), which constitutes sufficient security under Rule 65(c) of the Federal Rules of Civil Procedure to protect Intervenor Hoosier Hills and Defendant NRC against the reasonable damages they may directly suffer from the delay in the completion of the Administrative Action that issuance of the requested injunctive relief directly causes.

SO ORDERED this 6th day of July 2009.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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APPENDIX

CASE NO. 23-2052

INDEX TO DOCUMENTS REFERENCED IN THE APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC Plaintiff, v. PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, STEVEN C. BECKMAN, BERNARD A. LABUSKES, JR., MICHELLE A. COLEMAN, SARAH L. CLARK, CITIZENS FOR PENNSYLVANIA'S FUTURE, DELAWARE RIVERKEEPER NETWORK, and MAYA K. VAN ROSSUM Defendants.	CIVIL ACTION – LAW Docket No. 1:23-CV-00463-CCC **PLAINTIFF'S NOTICE OF APPEAL**

PLAINTIFF TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC'S NOTICE OF APPEAL

Notice is hereby given that the Plaintiff in the above-captioned proceeding, Transcontinental Gas Pipe Line Company, LLC, hereby appeals to the United States Court of Appeals for the Third Circuit from the June 5, 2023 Order (Doc. 30) and supporting Memorandum (Doc. 29) entered in this action denying Plaintiff's motion for preliminary injunction.

Respectfully submitted,

SAUL EWING LLP

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Dated: June 7, 2023

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC Plaintiff, v. PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, STEVEN C. BECKMAN, BERNARD A. LABUSKES, JR., MICHELLE A. COLEMAN, SARAH L. CLARK, CITIZENS FOR PENNSYLVANIA'S FUTURE, DELAWARE RIVERKEEPER NETWORK, and MAYA K. VAN ROSSUM Defendants.	CIVIL ACTION – LAW Docket No. 1:23-CV-00463-CCC **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I, Elizabeth U. Witmer, certify that on this 7th day of June, 2023, I electronically filed the foregoing Notice of Appeal with the Clerk of the Court using the CM/ECF system, which will cause notification of such filing and service to all parties through their counsel of record (listed below) and to the Clerk, U.S. Court of Appeals for the Third Circuit:

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,	:	**CIVIL ACTION NO. 1:23-CV-463**
	:	
	:	**(Judge Conner)**
Plaintiff	:	
	:	
v.	:	
	:	
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, *et al.*,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 5th day of June, 2023, upon consideration of the motion (Doc. 8) for preliminary injunction filed by plaintiff Transcontinental Gas Pipe Line Company, LLC ("Transco"), and the parties' respective briefs in support of and in opposition thereto, and for the reasons set forth in the accompanying memorandum of today's date, it is hereby ORDERED that Transco's motion (Doc. 8) is DENIED.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

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TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,	:	**CIVIL ACTION NO. 1:23-CV-463**
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	:	
Defendants	:	

MEMORANDUM

Plaintiff Transcontinental Gas Pipe Line Company, LLC ("Transco"), moves the court to preliminarily enjoin an administrative appeal now proceeding before the Pennsylvania Environmental Hearing Board ("PAEHB"). Transco posits that although the Natural Gas Act ("NGA" or "Act"), 15 U.S.C. § 717 *et seq.*, provides limited authority for the Pennsylvania Department of Environmental Protection ("PADEP") to participate in environmental regulation by issuing certain pipeline-related permits, the Act otherwise forecloses the Commonwealth's administrative review process and vests exclusive jurisdiction to review PADEP-issued permits with the Third Circuit Court of Appeals. For the reasons that follow, we will deny Transco's motion.

I. Procedural History

Transco commenced the above-captioned action with the filing of a two-count complaint on March 16, 2023. Transco names as defendants the PAEHB and its judges, as well as the appellants in the PAEHB appeal underlying the instant

lawsuit (Citizens for Pennsylvania's Future, the Delaware Riverkeeper Network, and Delaware Riverkeeper Maya K. van Rossum).[1] Transco seeks a declaratory judgment that the Third Circuit Court of Appeals has original and exclusive jurisdiction over review of the pipeline-related permits at issue in the PAEHB appeal (Count I) and that the NGA otherwise preempts PAEHB review of those permits (Count II).

Transco filed the instant motion for preliminary injunction one week after filing its complaint, and we scheduled a telephonic conference call concerning the motion for March 27, 2023. In the interim, the PADEP moved for leave to intervene, and the court granted that motion. Counsel for all parties agreed during the March 27 call that an evidentiary hearing is unnecessary and the motion can be resolved on the papers. The motion is now fully briefed and ripe for disposition.[2]

[1] During a telephonic scheduling conference on March 27, 2023, counsel for the PAEHB and its judges expressed they take no position on the instant motion. We refer to defendants who oppose the motion—Citizens for Pennsylvania's Future, Delaware Riverkeeper Network, and the Delaware Riverkeeper—as "the PAEHB Appellants" herein.

[2] Our briefing order instructed the parties to note in their respective briefs whether they request oral argument. (See Doc. 18 ¶ 3). The PAEHB Appellants' and PADEP's briefs are silent with respect to oral argument, and Transco explicitly states it is not requesting argument on its motion. (See Doc. 25 at 21). The court concludes oral argument is unnecessary on the question of whether preliminary injunctive relief is appropriate but reserves the right to schedule argument on the merits of this case at a later juncture.

II. Factual and Statutory Background[3]

The Federal Energy Regulatory Commission ("FERC") has exclusive authority under the Natural Gas Act to regulate the construction and operation of interstate natural gas sales and transportation. See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot., 833 F.3d 360, 367 (3d Cir. 2016);[4] see also 15 U.S.C. § 717 *et seq.* Before a natural-gas company may construct or operate facilities which transport natural gas (*e.g.*, pipelines), it must obtain from FERC a "certificate of public convenience and necessity." See Riverkeeper I, 833 F.3d at 367 (citing 15 U.S.C. § 717f(c)). Issuance of such certificates is conditioned upon the company's receipt of various state and federal authorizations required for the project. See id. (citation omitted).

Transco is a "natural-gas company" as that term is defined in the NGA. (See Doc. 1 ¶ 1); see also 15 U.S.C. § 717a(6). On March 26, 2021, Transco filed an application with FERC requesting authorization to construct and to operate the Regional Energy Access Expansion Project ("REAE Project"), a pipeline expansion and upgrade project impacting Pennsylvania, New Jersey, and Maryland. (See Doc.

[3] The background that follows derives largely from Transco's complaint, exhibits attached thereto, and applicable statutes.

[4] The Riverkeeper series features prominently in the parties' briefing. We refer to these cases as Riverkeeper I through Riverkeeper V. See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot., 833 F.3d 360 (3d Cir. 2016) ("Riverkeeper I"); Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Env't Prot., 870 F.3d 171 (3d Cir. 2017) ("Riverkeeper II"); Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot., 903 F.3d 65 (3d Cir. 2018) ("Riverkeeper III"); Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot., 751 F. App'x 169 (3d Cir. 2018) (nonprecedential) ("Riverkeeper IV"); Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot., 783 F. App'x 124 (3d Cir. 2019) (nonprecedential) ("Riverkeeper V").

8-2, Ex. A at 1 ¶ 1;[5] see also Doc. 1 ¶¶ 28-30). On January 11, 2023, FERC issued to Transco an Order Issuing Certificate and Approving Abandonment ("Certificate Order"), a type of certificate of public convenience and necessity. (See Doc. 1 ¶ 2; see also Doc. 8-2, Ex. A). The Certificate Order authorizes Transco to construct and to operate the REAE Project, subject to Transco obtaining certain requisite federal authorizations. (See Doc. 1 ¶ 3; see also Doc. 8-2, Ex. A. at 30 ¶ (A), (C)(3)). One such authorization is a Water Quality Certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, which in turn is conditioned on Transco obtaining the permits at issue in this case, specifically, an Erosion and Sediment Control Permit and Water Obstruction and Encroachment Permits ("REAE Permits"), from the PADEP. (See Doc. 1 ¶ 4; see also Doc. 1-5 at 6).

The PADEP issued the REAE Permits on February 3, 2023. (See Doc. 1-3). On March 14, 2023, the PAEHB Appellants appealed the REAE Permits to the PAEHB. (See Doc. 1 ¶ 14). Transco commenced this suit two days later, seeking to enjoin the PAEHB appeal. The PAEHB has since issued a prehearing order setting discovery and other deadlines, but it has not taken any substantive action on the appeal. (See Doc. 8-2, Ex. B).

III. Legal Standard

A preliminary injunction is an extraordinary remedy and should issue only in limited circumstances. See Issa v. Sch. Dist. of Lancaster, 847 F.3d 121, 131 (3d Cir. 2017) (citing Ferring Pharm., Inc. v. Watson Pharm., Inc., 765 F.3d 205, 210

[5] For ease of reference, we utilize the ECF header pagination in addition to any internal paragraph numbering when citing to the parties' exhibits.

(3d Cir. 2014)). We apply a familiar four-factor test in determining the propriety of preliminary injunctive relief. The movant must, as a threshold matter, establish the two "most critical" factors: likelihood of success on the merits and irreparable harm. Reilly v. City of Harrisburg, 858 F.3d 173, 179 (3d Cir. 2017). Under the first factor, the movant must show that "it can win on the merits." Id. This showing must be "significantly better than negligible but not necessarily more likely than not." Id. The second factor carries a slightly enhanced burden: the movant must establish that it is "more likely than not" to suffer irreparable harm absent the requested relief. Id. Only if these "gateway factors" are satisfied may the court consider the third and fourth factors: the potential for harm to others if relief is granted, and whether the public interest favors injunctive relief. Id. at 176, 179. The court must then balance all four factors to determine, in its discretion, whether the circumstances favor injunctive relief. Id. at 179.

IV. Discussion

Transco[6] asks this court to preliminarily enjoin the appeal of the REAE permits currently proceeding before the PAEHB. Transco claims the Natural Gas Act preempts Pennsylvania's administrative review processes, installing the Third Circuit Court of Appeals where the PAEHB ordinarily sits in the Commonwealth's administrative scheme and stripping the PAEHB of its jurisdiction to review the

[6] The PADEP concurs in Transco's request for injunctive relief, and it largely echoes Transco's arguments in its own briefing. (See generally Doc. 23). For ease of reference, we cite primarily to Transco's briefing and argumentation.

REAE permits. Because we are unconvinced, at least at this preliminary stage, that our court of appeals would share Transco's view, we will deny Transco's motion.

A. Likelihood of Success[7]

A party seeking preliminary injunctive relief must establish a reasonable likelihood of success on the merits of their claim. See Reilly, 858 F.3d at 179. Our court of appeals has explained that this showing must be "significantly better than negligible but not necessarily more likely than not." See id. The requisite strength of a claim on the merits depends ultimately on the balance of the harms: "the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." See id.

The NGA grants FERC exclusive authority to regulate construction and operation of interstate natural gas pipelines. See Riverkeeper I, 833 F.3d at 367; see also 15 U.S.C. § 717 *et seq.* The United States Supreme Court has held that in enacting the NGA, Congress "occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." See Schneidewind

[7] The EHB Appellants raise a cursory argument in their opposition brief suggesting Transco has failed to establish a basis for this court to exercise subject matter jurisdiction. (See Doc. 24 at 32-33). The argument appears to be premised on a mistaken understanding of the relief Transco seeks; the EHB Appellants aver this court has "no role in the review of permits issued for interstate natural gas facilities subject to the NGA" and therefore cannot issue an injunction "in aid of its NGA jurisdiction." (See id. at 33). Transco, however, is not asking this court to review the REAE permits; Transco appropriately invokes our federal question jurisdiction under 28 U.S.C. § 1331, and asks us to declare its rights under federal law (*viz.*, the NGA) pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. (See Doc. 1 ¶ 26; Doc. 25 at 20). The EHB Appellants do not renew this argument in their later-filed motion to dismiss and supporting brief, (see Docs. 27, 28), and we deem it to have been abandoned.

v. ANR Pipeline Co., 485 U.S. 293, 305 (1988). Congress has, however, carved out some room for state involvement in the otherwise "exclusively federal domain," see id., of interstate pipeline regulation. Specifically, the NGA "allows states to participate in environmental regulation of [interstate natural gas] facilities under three federal statutes: the Clean Air Act, the Coastal Zone Management Act, and the Clean Water Act." Riverkeeper I, 833 F.3d at 368 (citing 15 U.S.C. § 717b(d)).

Transco concedes the REAE permits are required under Section 401 of the Clean Water Act and thus fall within the NGA's express statutory carveout for state participation. But Transco claims the NGA subsumes the Commonwealth's ordinary administrative review process after that point—including the pending quasi-judicial appeal before the PAEHB—and requires any request for review of those permits be made to the Third Circuit Court of Appeals. (See Doc. 10 at 2). Transco's argument is twofold. It first claims the PAEHB appeal is proceeding in contravention of the NGA's judicial-review provision—15 U.S.C. § 717r(d)(1)—which Transco says vests original and exclusive jurisdiction "over the review of PADEP-issued permits," like the REAE permits, with the Third Circuit. (See Doc. 10 at 12-17). And it argues in the alternative that the NGA otherwise preempts all state administrative review beyond the PADEP's issuance of the required permits. (See id. at 18-24). Despite Transco's asseverations to the contrary, the existing decisional law favors the EHB Appellants.

As a preliminary matter, Transco has no recourse in the NGA's judicial-review provision, 15 U.S.C. § 717r(d)(1). That statute reads, in pertinent part, as follows:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law . . . .

15 U.S.C. § 717r(d)(1). Section 717r(d)(1) on its face speaks only to where a "*civil action* for the review of" certain state administrative actions must be filed; it says nothing of a state's ordinary administrative processes or the various levels of review those processes typically entail. See id. (emphasis added). Our court of appeals has interpreted "civil action" as used in the NGA to encompass only judicial proceedings. See Township of Bordentown v. FERC, 903 F.3d 234, 266-68 (3d Cir. 2018). In concluding that Section 717r(d)(1) did not bar an administrative appeal of certain pipeline-related permits within New Jersey's Department of Environmental Protection ("NJDEP"), the court held in no uncertain terms that "a 'civil action' refers only to cases brought in courts of law or equity and *does not* refer to hearings or other quasi-judicial proceedings before administrative agencies." See id. at 267 (emphasis added).

Transco spills much ink attempting to distinguish Bordentown on its facts. Transco notes (correctly) that New Jersey's administrative structure is different than its Pennsylvania counterpart: in New Jersey, appeals of permitting actions are

kept "in house" within the singular entity of the NJDEP, whereas Pennsylvania's General Assembly outsourced appeals of PADEP actions to the PAEHB. (See Doc. 25 at 7-9); see also 35 PA. STAT. AND CONS. STAT. ANN. § 7513(a) (establishing PAEHB as "independent quasi-judicial agency"). That factual distinction is one without a legal difference for purposes of determining whether a PAEHB appeal is a "civil action" filed elsewhere than the Third Circuit Court of Appeals, in contravention of the NGA's judicial-review provision. Transco does not and cannot dispute that a PAEHB appeal is a quasi-judicial proceeding before an administrative agency—not a judicial proceeding brought in a court of law or equity—and it therefore is not a "civil action" for purposes of Section 717r(d)(1). See Bordentown, 903 F.3d at 266-68. Accordingly, Transco has not established a likelihood of success on the merits of its claim for "enforcement" of Section 717r(d)(1).

Transco's preemption claim rests on a similarly flawed attempt to differentiate Bordentown as well as its misapprehension of the Riverkeeper cases. Understanding Transco's argument—and why it is unpersuasive—requires a brief exploration of the Riverkeeper cases.

In Riverkeeper I, our court of appeals considered its jurisdiction under Section 717r(d)(1) over certain certifications issued by the PADEP and NJDEP. See Riverkeeper I, 833 F.3d at 371. The question before the court was whether those certifications had been issued "pursuant to Federal law" as contemplated by the NGA. See id. The court held that they were, hence the civil action for their review was appropriately filed with the Third Circuit under Section 717r(d)(1). See id. at 371-73. In Riverkeeper II, the court was asked whether PADEP permitting

decisions were "final" and ripe for judicial review, even though they had not been reviewed by the PAEHB—which ordinarily would be the next step in the Commonwealth's administrative process. See Riverkeeper II, 870 F.3d at 176. The court concluded the PADEP action at issue in that case *was* final because there had been no timely appeal to the PAEHB, making the PADEP's decision "final" under state law; the court left for another day the broader question whether "the Natural Gas Act requires finality and how such a requirement would interact with Pennsylvania's administrative scheme." See id. at 177-78.

The court issued Riverkeeper III one year later and answered the question it had left open in Riverkeeper II, specifically, "whether the availability of further state administrative review" in the form of an appeal to the PAEHB "would render [PADEP's] decision non-final." See Riverkeeper III, 903 F.3d at 71-72. The court examined the Commonwealth's administrative processes, emphasizing in particular that the PADEP and PAEHB are independent agencies and that by operation of Pennsylvania law, PADEP orders are effective upon issuance. See id. at 72-75. The court concluded that "[n]otwithstanding the availability of an appeal to the EHB," the PADEP's decision bore all of the "traditional hallmarks of final agency action" and, accordingly, the court of appeals had "exclusive jurisdiction to hear any 'civil action for the review of' such a decision." See id. The last two cases in the series, Riverkeeper IV and Riverkeeper V, then apply Riverkeeper III to summarily reject finality-based jurisdictional arguments and reaffirm the Third Circuit's jurisdiction to hear civil actions for review of final PADEP decisions under Section 717r(d)(1). See Riverkeeper IV, 751 F. App'x at 172-73; Riverkeeper V, 783 F. App'x at 127.

This summary is notable for what it lacks, which is any discussion of preemption. The reason for this is uncomplicated: the Riverkeeper cases were not preemption cases.[8] The decisions speak only to the point at which our court of appeals obtains jurisdiction under Section 717r(d)(1) to entertain a civil action for review of state administrative action. In not one of those decisions did the court suggest or even imply that ripening of a civil action for purposes of *judicial review* under Section 717r(d)(1) simultaneously divests the PAEHB of its ability to conduct *administrative review* otherwise available under Pennsylvania law. Rather, the cases "proceeded based on the understanding—express or implicit—that state administrative review"—namely, an appeal to PAEHB—"*was available if desired*." See Bordentown, 903 F.3d at 269 (emphasis added) (citing Riverkeeper II, 870 F.3d at 177, and noting court "assumed that the petitioners could have sought an appeal to the [PAEHB] if they had done so within the time period provided in the Pennsylvania statute," and Riverkeeper III, 903 F.3d at 74, and noting court found order to be final and appealable to the Third Circuit "[n]otwithstanding the availability of an appeal to the EHB" (alteration in original)).

Bordentown, however, *is* a preemption case, and it strongly suggests that our court of appeals views the relationship between the NGA and state administrative schemes differently than Transco. In Bordentown, the court considered whether

[8] Indeed, only Riverkeeper I even mentions preemption, and it is in the context of explaining that while the NGA "preempts state environmental regulation of interstate natural gas facilities," it "allows states to participate in environmental regulation of these facilities" under the Clean Air Act, Coastal Zone Management Act, and Clean Water Act. See Riverkeeper I, 833 F.3d at 368.

the NJDEP erred in concluding, in reliance on Riverkeeper I, that the NGA stripped the NJDEP of its jurisdiction under state law to grant adjudicatory hearings from pipeline-related permitting decisions. See Bordentown, 903 F.3d at 266. In holding the NJDEP did err, the court made plain what the Riverkeeper decisions implied: "Because . . . the NGA explicitly permits states 'to participate in environmental regulation of [interstate natural gas] facilities' under the [Clean Water Act], . . . and only removes from the states the right for *their courts* to hear civil actions seeking review of interstate pipeline-related state agency orders made pursuant thereto, the NGA leaves untouched the state's internal administrative review process, *which may continue to operate as it would in the ordinary course under state law*." See id. at 268 (emphasis added) (first alteration in original). And in the ordinary course under Pennsylvania law, the next step in the administrative review of the PADEP permits is an appeal to the PAEHB. See 35 PA. STAT. AND CONS. STAT. ANN. § 7514.

Transco underscores the structural difference between the New Jersey administrative process reviewed in Bordentown and the Pennsylvania process at issue here, claiming it was the "intra-agency" nature of New Jersey's administrative process that allowed the NJDEP adjudicatory hearing to survive NGA preemption. (See Doc. 25 at 7-9). The court did describe New Jersey's administrative structure and the "intra-agency" nature of the review in its opinion, but never so much as implied that structure was dispositive or that its preemption analysis was unique to New Jersey's unitary system. *Per contra*, the court acknowledged administrative processes "vary widely" from state to state and postulated that, recognizing this

diversity, Congress drafted Section 717r(d)(1) to preempt state judicial review only, while leaving administrative review to the states and their various devices. See Bordentown, 903 F.3d at 268. The court's ultimate conclusion bears none of the nuance Transco seeks to inject. Its holding is clear and unequivocal: the NGA "does not preempt state administrative review of interstate pipeline permitting decisions." See id. at 269.

Transco's remaining arguments against this result fail to persuade us that preliminary injunctive relief is warranted—and again are answered either directly or by implication in Bordentown. Transco posits any adjudication by the PAEHB technically would not be a decision "to issue, condition, or deny" the REAE permits, and therefore Transco would be without any path to appeal an adverse decision of the PAEHB to the Third Circuit. (See Doc. 25 at 16-19). But the same argument would apply to a final decision by the NJDEP; the initial agency action is a decision to issue, condition, or deny a permit, but the final step, a ruling from the NJDEP's commissioner after the adjudicatory hearing, would be a decision to "affirm, reject, or modify" the initial decision. See N.J. STAT. ANN. § 13:9B-20. The court of appeals apparently did not deem that distinction a bar to allowing the NJDEP adjudicatory hearing to proceed.

The decisional law also refutes Transco's claim that allowing administrative appeals to the PAEHB would create an "unworkable" dual-jurisdiction system and defeat the NGA's purpose to "streamline the review of state decisions taken under federally delegated authority." (See Doc. 25 at 5, 13-14). The Bordentown court considered precisely the same argument—raised there by Transco as intervenor, as

well as the NJDEP—and was unconvinced. See Bordentown, 903 F.3d at 271-72. The court acknowledged that, if the NJDEP's permitting decision was final when issued (as argued there by Transco and the NJDEP), it may well be that an objector has two avenues of relief: an administrative hearing before the NJDEP, *or* a collateral civil action filed with the Third Circuit. See id. Confirming that the Riverkeeper cases are not preemption cases, the court of appeals clarified the finality rule developed therein reflects "a constraint on our own jurisdiction, *not* a determination that we are the only forum available to consider final orders." See id. (emphasis added). The court explained: "The language of the statute merely requires that *judicial challenges* to the outcome of the administrative process come straight to us. If, however, a state allows for an internal administrative review of a permitting process, such a process does not contravene the NGA." See id. at 272; see also id. at 271 n.25 (observing "even though a petitioner might have the right immediately to commence a civil action in this Court, this does not necessarily extinguish his or her right instead to seek redress via the available administrative avenues before filing that civil action").[9]

[9] Transco also leans heavily on Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network, 921 F. Supp. 2d 381 (M.D. Pa. 2013), rejected in part by Riverkeeper III, 903 F.3d at 71. The court in Tennessee Gas granted the natural gas company's motion for preliminary injunction and enjoined ongoing PAEHB proceedings, finding Section 717r(d)(1) required that appeals challenging PADEP-issued permits—even nonfinal permits—be filed with the Third Circuit and thus preempted PAEHB review. See Tenn. Gas., 921 F. Supp. 2d at 388-95. The case predates (and is rejected in part by) the Riverkeeper cases, and the district court did not have the benefit of the court of appeals' view, expressed five years later in Bordentown, that Section 717r(d)(1) establishes an exclusive forum for *judicial* review—when desired—of state administrative action, but does not preempt otherwise-available state administrative appeals processes.

Finally, we note that the Commonwealth Court of Pennsylvania has adopted a similar reading of Bordentown. In Cole v. Pennsylvania Department of Environmental Protection, 257 A.3d 805 (Pa. Commw. Ct. 2021), the court addressed precisely the question presented here and read Bordentown and the Riverkeeper cases the same way. The court concluded there are two paths for those seeking to challenge a permitting decision by the PADEP: they may exercise their right, in

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NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333 (3d Cir. 2001), on which Transco also relies, is inapposite. The natural gas company there (NE Hub) received a certificate order from FERC conditioned in part on receipt of permits from the PADEP. See NE Hub, 239 F.3d at 339. The PADEP issued permits to NE Hub, and two competitor companies appealed the permits to the PAEHB, seeking to relitigate 30 issues all of which had been raised before and addressed by FERC. See id. NE Hub filed suit in this court, seeking declaratory judgment that the PAEHB could not revisit FERC's various technical, safety, or environmental determinations. See id. at 339-40. The district court dismissed the suit on ripeness (among other) grounds, determining that participating in a state regulatory review process the result of which may ultimately be preempted is not itself a cognizable harm. See id. at 340. The Third Circuit reversed, finding the process itself could be a burden and thus the suit in district court was ripe. See id. at 344; see also id. at 348-49. Transco claims NE HUB "strongly suggested that collateral attacks via state environmental review processes are field preempted by the NGA and conflict preempted to the extent they contradict the FERC's orders." (See Doc. 10 at 22). We disagree with Transco as to NE Hub's application here. First, as with the Riverkeeper cases, NE Hub is at bottom a ripeness decision, not a preemption decision. Second, the court did not view its decision as one of sweeping preemption; rather, it understood NE Hub's concern to be limited to relitigating the 30 issues already decided by FERC and observed "NE Hub does not suggest that federal preemption precludes E.H.B. from considering other issues." See id. at 345. Third, even if NE Hub had erected a complete preemption bar prohibiting all state regulatory involvement in review of pipeline-related permits, the decision predates 2005 amendments to the NGA expressly authorizing states to participate in environmental regulation under the Clean Water Act. See Energy Policy Act of 2005, P.L. No. 109-58, 119 Stat. 594, § 311(c)(2) (codified at 15 U.S.C. § 717b(d)). NE Hub thus provides little insight on the question of whether PAEHB review of the REAE permits—issued pursuant to the Commonwealth's explicitly preserved authority under Section 717b(d)—is preempted.

accordance with Pennsylvania law, to file an administrative appeal to the PAEHB, or they may file a collateral civil action in the Third Circuit Court of Appeals under Section 717r(d)(1). See Cole, 257 A.3d at 820-21. Petitions for allowance of appeal are pending, but the Cole decision in our view is a straightforward application, and is the logical result, of Bordentown's preemption analysis.

At this preliminary stage, Transco has failed to persuade us the NGA strips the PAEHB of its ability to review the REAE permits, for the simple reason that our court of appeals' precedent does not say what Transco wants it to. The Riverkeeper decisions do not divest the PAEHB of jurisdiction; they define the limitations of the *court of appeals'* jurisdiction. And Bordentown states clearly what was unstated in the Riverkeeper quintet: state administrative review may proceed unimpeded even after the state permitting decision has technically ripened for purposes of judicial review. In other words, Section 717r(d)(1) does not mandate the filing of a civil action in lieu of exhausting administrative remedies; it provides only that *if* a civil action is filed, it must be filed with the Third Circuit. See Bordentown, 903 F.3d at 271-72. We therefore conclude Transco has not established a likelihood of success on the merits of its claim that the NGA preempts the pending PAEHB appeal.

B. Irreparable Harm

A plaintiff seeking a temporary restraining order or preliminary injunction must also establish irreparable harm. Irreparable harm is an injury of such an irreversible character that prospective judgment would be "inadequate" to make the moving party whole. See Anderson v. Davila, 125 F.3d 148, 163 (3d Cir. 1997);

Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989). Mere risk of injury is not sufficient to meet this standard. Rather, the moving party must establish that the harm is imminent and probable. Anderson, 125 F.3d at 164. Harm that may be contained effectively only through immediate injunctive relief is properly deemed "irreparable." Instant Air Freight, 882 F.2d at 801. Availability of money damages will typically "preclude a finding of irreparable harm." Id. at 177 (citing Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 n.3 (3d Cir. 1988)).

The required showings on irreparable harm and likelihood of success are correlative: that is, the weaker a plaintiff's merits showing, the more is required in the way of irreparable harm, and vice versa. See Reilly, 858 F.3d at 179 (quoting Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) (Easterbrook, J.)). This is particularly problematic for Transco, as its irreparable harm argument is in lockstep with its argument on the merits: Transco contends the harm *is* that, without an injunction, it will "be forced to participate in onerous, time-consuming proceedings before the EHB . . . that are contrary to the NGA, preempted by federal law[,] and which could undermine the [REAE] Project." (See Doc. 10 at 24-25). Its principal irreparable harm argument thus rises and falls with its merits argument, and we have already found Transco

has not made the requisite preliminary showing the PAEHB lacks jurisdiction to review the REAE permits.[10]

Transco's additional irreparable-harm assertions are likewise unavailing. Transco avers it will suffer financial injury if the PAEHB were to delay construction by staying the REAE permits. (See Doc. 10 at 27 (citing Doc. 8-2, Ex. C at 50-51, 56-57 ¶¶ 15-18, 34-38)). To support this assertion, Transco cites a declaration of one of its project managers submitted in separate litigation in the United States Court of Appeals for the District of Columbia Circuit earlier this year. (See Doc. 8-2, Ex. C). That lawsuit involved a petition for review of FERC's certificate order under Section 717r(b), and the cited paragraphs of the declaration speak primarily to costs associated with delay of certain tree-felling activities. (See id. at 50-51, 56-57 ¶¶ 15-18, 34-38). Even if we assume *arguendo* that all of those estimated costs would carry over to this case, the claimed harms are purely economic in nature and thus would be compensable by remedy at law. See Instant Air Freight, 882 F.2d at 801 (citing Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 n.3 (3d Cir. 1988); *In re* Arthur Treacher's Franchise Litig., 689 F.2d 1137, 1145 (3d Cir. 1982)).

[10] Transco relies on NE Hub here as well, for its statement that "the need to participate in a state regulatory process in conflict with federal policy has been recognized as a hardship." (See Doc. 10 at 25 (quoting NE Hub, 239 F.3d at 346)). As a threshold matter, that observation assumes the state regulatory process is or may be preempted by federal law; when a lawful process is not preempted, being required to participate in it cannot be claimed as hardship. In any event, Transco divorces the observation from its context. The court in NE Hub was measuring ripeness—not irreparable harm. The ripeness analysis tasked the court to consider the practical utility of the declaratory judgment sought, and one aspect of practical utility is "the hardship to the parties of withholding judgment." See NE Hub, 239 F.3d at 344-45 (citation omitted). The decision does not establish a *per se* rule of irreparable harm in regulatory preemption cases.

As for Transco's second contention about delay, namely "the importance of placing the Project in service by the 2023-2024 heating season," Transco again points primarily to "financial consequences" and lost revenue, (see Doc. 8-2, Ex. C at 56-57 ¶ 35), in addition to speculating about the loss of shipper confidence it "may suffer" and the impact delay "may have" on Transco's reputation, (see id. ¶ 34). Particularly in light of the dubious merit of Transco's claims, we find Transco has not carried its burden of showing it will suffer irreparable harm if the PAEHB appeal is not enjoined.[11]

C. Remaining Factors

Transco has failed to demonstrate the first two "gateway" factors for preliminary injunctive relief. See Reilly, 858 F.3d at 176, 179. Accordingly, we need not address whether the EHB Appellants would suffer greater harm than that alleged by Transco if injunctive relief is granted, or whether the public interest favors the requested relief. See id.

[11] PADEP cites a separate potential harm in its briefing, namely, a concern that absent "clear direction regarding the proper forum, there is a real risk that parties would appeal PADEP permitting actions on FERC regulated pipeline projects under the Natural Gas Act to the EHB, or the Third Circuit, or both." (See Doc. 23 at 13 (citing Cole, 257 A.3d at 821)). As we have noted, the court of appeals in Bordentown contemplated and expressed no concern with the possibility that there may be alternative forums—one administrative and one judicial—in which an aggrieved party may pursue its remedies. See Bordentown, 903 F.3d at 271-72.

V. Conclusion

Transco has not shown that the extraordinary remedy of a preliminary injunction is warranted in this case. See Issa, 847 F.3d at 131 (citing Ferring Pharm., Inc., 765 F.3d at 210). Accordingly, we will deny Transco's motion. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner
United States District Judge
Middle District of Pennsylvania

Dated: June 5, 2023